

15 L.c.

*Jura Ecclesiastica:*  
OR, THE  
PRESENT PRACTICE  
IN 510. C 20  
*Ecclesiastical Courts.*

S H E W I N G

Their Origin, Extent, Increase, Power, Authority and Operation, and in what Manner subject to, and restrained by, the Temporal Laws and Courts of Judicature; Ecclesiastical Courts what they are, how governed, and their Proceedings.

C O L L E C T E D

From the Best AUTHORITIES, and Interspersed with various NEW CASES, never before printed.

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By a BARRISTER of the *Middle-Temple.*

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V O L. II.

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Journal Ecclesiastic  
OF THE  
PRESENT PRACTICE

Ecclesiastic Courts



These Courts, which are now  
subject to, and regulated by, the  
Laws and Customs of England; Ecclesiastical  
Courts which they are, how regulated, and their  
Provisions.

collected  
from the Best Authorities, and interspersed  
with various New Cases, never before printed.

By a Barrister at Law, &c.

VOL. II.

Printed by J. Smith, in Strand, London.

# Jura Ecclesiastica.

V O L. II.

V. *The Ecclesiastical Courts are also subordinate and subject to the Control of the Superior Temporal Courts in many Cases, where both the Matter and the Person, or one of them, either are of Ecclesiastical Sort, or are so pretended by Ecclesiasticks to be.*

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B. *The Person.*

C. *Both.*

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**A. The Matter.**

**I. Matters Matrimonial, or of Legitimation, or Bastardy.**

**1. General.**

**1. M**T next Endeavour shall be to shew the Inferiourity and Subjection of these Spiritual Courts to the Superior Temporal Courts, even in Cases where both the Matter and Person, or one of them however, are Ecclesiastick, or of Ecclesiastical Cognizance, or at least contended by Ecclesiasticks so to be. And first where the Matter is, or contended to be, of Ecclesiastical Jurisdiction. And first of all of Matters Matrimonial. And tho' all Matrimonial Causes have long been determined in the Ecclesiastical Courts, and are now properly within the Cognizance and Jurisdiction of the Clergy; yet they were not always so; for both

*Godolph. Repert.*

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in

*in these Causes; yet by the Rules of the Common Law, he hath a Superintendency over their Proceedings, with Power of Direction when and how they shall proceed, and of Restraint and Correction, if they do not proceed duly; as is clear from many Writs of different Natures, directed to Bishops, where he commands them to certify Bastardy, Excommunication, Profession, *Accouplement en loyal matrimonie*, *De admittend' Cler'*, *De cautione admittenda*, &c. as well as by the Writs of Prohibition, Consultation, and Attachment *sur Prohibition*, &c. *Dav. 51. b. 52. a.**

2. Dispensations for incestuous Marriages brought great Profit to the Church. *Gilb. 159.*

3. *The Difference between general and special Bastardy is, that general Bastardy is on Certificate from the Ordinary of the Diocese to the King's Justices, after such Inquiry made, that the Party inquired of is a Bastard, or not a Bastard, upon some Question of Inheritance, &c. and this can only be after the same hath been moved in the Temporal Courts, and the Ordinary demanded to certify, whether, &c.*

*Whence is a notable Case in Davis, of an arbitrary and corrupt Bishop, who, without any such previous Demand, contrary to Law and Conscience, was pleased to inquire and sentence a Strumpet a lawful Wife and Bastard Mulier, to the Defamation, Scandal and Disinberison of a virtuous and lawful Wife, and her lawful Issue, for no other or better Reason, as I can find, than that the Whore, if not her Bastard, were of his Lordship's Kindred; as will appear from the Case at large in the Book, and mention'd hereafter in the present Work. Special Bastardy is a Suit commenced in the King's*

*4. doep. Reper.*

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*p. 25.*



Court of one who calls another so, and is sentenced; for that Bastardy is the principal Thing in Trial, and no Inheritance, &c. contended for; from whence it appears, that in both these Cases Bastardy is rather taken for an Examination or Trial whether a Man's Birth be legitimate or defective, than for Bastardy it self.

4. If Baron and Feme are sued in the Ecclesiastical Court for Polygamy, and it appears, that the Wife was married before to J. S. within the Age of Consent, and after Age of Consent disagreed, and married the Defendant, whereupon the Court acquits them; yet if they tax Costs to the Plaintiff, no Prohibition shall go; for that they have Jurisdiction of the Cause, and it is their Usage there to tax Costs where the Plaintiff hath *Causam Litigandi*. Mich. 8 Ja. Blackdone's Case. Rol. Abridgment, Prohibition, 299. Case 9. Q. as to the Costs.

5. None may write to the Bishop to certify Bastardy, Mulierty, Loyalty of Matrimony, and the like Ecclesiastical Matters, but the King's Courts of Record; but in Cases of Inferior Courts, as London, &c. the Plea must be removed into the Court of Common Pleas, and that Court must write to the Bishop, and then remand the Record. Co. Lit. 134. a. *And this, as I take it, in Honour to Prelates, who, as I conceive, in these Cases of Certificates, as in many others, are but Ministerial Officers to the King and his Superior Temporal Courts, that yet they might not be subject to the Command of these Inferior Courts.*

The Pope himself with all his Might cannot marry two People averse to Marriage; it is true, he may celebrate the Sacrament of Marriage, but it is essential that the Consent of the Parties be first had, else the Marriage, tho' his Holiness's own Act, is

void. *Father Paul's Right of Sovereigns* 340.

For

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For more Matter on Rights of Matrimony, see 5 Co. *De Jure Regis Eccl.* 9. a. See also *Vaugh. Rep.* *Harison's Case*, and also *Hill's Case*.

2. *Who may marry, and what necessary thereunto.*

1. <sup>38</sup>**B**Y *Stat.* 32 H. 8. cap. 17. If a Spiritual Court proceeds to impeach, or dissolve, a Marriage out of the *Levitical* Degrees, then the Temporal Courts are to prohibit them; for by that Statute all Marriages out of those Degrees are declared to be good and lawful; and therefore if the Spiritual Court molest People in doing what is declared lawful to be done by the Statutes of the Realm, they are to be prohibited by the Temporal Courts, because they exceed their Jurisdiction thus bounded by the Temporal Law. *Gilb.* 156.

2. All Marriages between Cousin Germans and other Collateral Cousins are made lawful by the Statute 32 H. 8. cap. 38. and if Marriages, *infra* these Degrees, should be questioned as incestuous in the Spiritual Court, a Prohibition lies *sur le stat.* *Vaugh.* 218, &c. *Hale's Anal.* fo. 42.

*Burns's Law*  
v. 2. p. 36. *contra*

33. *Eliz.*

3. Suit was in Court Christian for marrying his Wife's Sister's Daughter; a Prohibition went; for that such Marriage was not prohibited by the *Levitical* Law. *Moor* 907.

4. Consent is necessary to every Marriage; for *Consensus, non Concubitus, facit Matrimonium*, & *consentire non possunt ante annos nuptiales.* 6 Co. 22.

3. *Who a Bastard, and how disabled as such.*

1. **B**astardy signifies a Defect of Birth objected to one born out of Wedlock. *Bract. lib. 5. c. 19.*

2. As to Bastardy, all the Bishops instanced the Lords that they would consent, that all such as were born before Matrimony should be legitimate as well as those born within Matrimony; as to the Succession of Inheritances; forasmuch as the Church accepteth them for legitimate. And all the Earls and Barons, with one Voice answered, that they would not change the Laws of the Realm, which hitherto had been used and approved. *Stat. 20 H. 3. cap. 9.*

3. He is not a Bastard who is born within Espousals. A Bastard has no Father. *Fitz. Abr. Tit. Bastard 1.*

4. Divorce *Causa Consanguinitatis in parentela*, shall not make the Issue a Bastard. *Fitz. Tit. Bastard 21.*

5. *Cui Pater est Populus, pater est sibi nullus*  
[*Et omnis;*  
*Cui Pater est Populus, non habet ipse Patrem.*

Such Bastard cannot inherit, nor any inherit to him; but one of his own Body. *Lit. sect. 401.* Or if the Child be begotten by him, who marries her after the Birth of the Child; yet it is, in Judgment of Law, a Bastard, tho' the Church holds it legitimate. *Stat. 20 H. 3. 9. 1 H. 6. 3. Co. Lit. 244.*

2 Contra as to  
personals  
Godolph. Rep.  
407  
7



4. *Where these Matters are to be tried.*

1. **C**oufinage. Special Bastardy was tried *per Pais*. Bro. Abr. Trial, 34. Bastardy, 18. Trials, 81.

2. Bastardy antiently was tried *per Pais*; but now it is triable by the Ordinary. Bro. Abr. Trial.

3. *Per Norton*: Where Bastardy comes in Question of one dead, it shall be tried *per Pais*, and not by the Bishop. Bro. Abr. Trial, 26. Bastardy, 9. Visne, 61.

4. Bastardy was alledged in one by whom the Demandant conveyed in Formedon, and for that he was no Party to the Writ, and dead, it was tried *per Pais*, and not by the Bishop's Certificate. Bro. Abr. Trials, 10, 70.

5. In Trespass, on Issue, whether *J. N.* was born within Espousals, or out, was tried *per Pais*. Bro. Abr. Trials, 32. Bro. Abr. Visne, 40, 48, 50.

6. Affise. They were at Issue on Special Bastardy, if the Tenant was the Son by the first Wife, by whom the Land descended, or by the second Wife; and the Espousals and Birth were alledged in a foreign County, and it was awarded, that the *Visne* should be of both Counties. Bro. Abr. Tit. Visne, 97, 98, 12.

7. Appeal by the Wife *de morte Viri*. The Defendant pleaded, *Que el ne fuit unques accouple in loyal Matrimonie*, and it was tried by the Bishop's Certificate. Bro. Abr. Trials, 74, 88, 90.

8. *Per*

8. *Per Belknap*: Feme Covert, or Sole, born before Marriage, & *bujuſmodi*, ſhall be tried *per Pais*; but General Baſtardy, *ou ne unques accouple en loyal Motrimonie*, & *bujuſmodi*, ſhall be tried by the Biſhop's Certificate. *Et hoc eſt de Baſtardy of one who is Party to the Writ. Bro. Abr. Tit. Trial, 16, 21, 22, 53.*

9. *Mr. Juſt. S. Eyre*: There are many Caſes which are properly and purely of Eccleſiaſtical Cognizance; but if a Title of Land comes to be tried in the Temporal Court, into which thoſe Matters accidentally fall in, they are to be judged of and tried by that Temporal Court. As in a Trial upon Marriage, if Iſſue be joined, Marriage, or no Marriage, this is to be tried by Certificate from the Biſhop; but if there be a Queſtion upon a Trial of a Title of Land, whether a Perſon under whom either of the Parties claim was married to another, or no, the Temporal Court will judge of that Matter without Certificate, as was done in a famous Caſe in this Court, in my Lord *Hale's* Time, The Caſe of the Lord *Danby's* Lady and *Mr. Emerton*. If any one claims as Heir to his Father, and the Queſtion ariſeth, whether his Mother was married to him or not, this Court (*B. R.*) will try the Matter. *Skin. 455.*

10. Prohibition was moved for to the Eccleſiaſtical Court of *Coventry*, Suit being there againſt Plaintiff for Inceſt, in marrying his firſt Wife's Siſter, ſuggeſting that the ſaid ſecond Wife was dead, by whom he had a Son, to whom an Eſtate was deſcended, as Heir of his Mother, and though he

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had pleaded this Matter, they went on to annul the Marriage, and bastardize the Issue. *Et per Cur'*: A Prohibition shall go as to annulling the Marriage, or bastardizing the Issue; but they may proceed to punish the Incest. *Salk. 548. Vide Must be first moved in the Temporal Courts.*

11. How Bastardy is to be proved or inquired into, if pleaded, see *Rast. Ent. Bastardy, fo. 104. and Stat. 9 H. 6. c. 11. Kitch. fo. 64. Bro. Tit. Bastardy.*

\* 12. In *B. R. Pasch. 2 Geo. 2. Sampson & Ux' v. Cooke. Per Cur'*: *Uxor, aut Non uxor*, was proper for a Trial by the Country, as well as *Copulatus in Matrimonio.*

13. In Case of a Bishop's Certificate of Bastardy, any one may take Advantage of it. *Doct. & Stud. lib. 2. cap. 5. fo. 68. a.* But this must be understood of one who is Party to the Writ; for if Bastardy be imputed to one not a Party, but a Stranger to the Writ, there the Bastardy shall be tried by twelve Men; in which Case the Party in whom the Bastardy is laid shall not be concluded, because he is no Party to the Trial; and may have no Attaint; but he who is Party to the Issue may have Attaint, and therefore he shall be concluded. *Ibid. 68. b.*

5. *Must be first moved in the Temporal Courts.*

1. **I**T was said, the very Cause and Reason wherefore the Ecclesiastical Judge might not inquire of Legitimation, or Bastardy, before he had Direction or Command from the  
the



the King's Temporal Courts was, because the Court Christian had no Jurisdiction or Power to intermeddle with Temporal Inheritances directly, or indirectly; for it was observed, that Christ himself refused to meddle in such Case, when petitioned thereto. *Luc.*

12. *Magister, dic Fratri meo ut dividat mecum Hereditatem;* he answered, *Quis me constituit Judicem, aut Divisorem, super vos;* and therefore *Tempore H. 3.* when the usurped Jurisdiction of the Pope was elevated higher than ever it was, either before or since, in the King of *England's* Dominions, Pope *Alexander* the Third having granted a Commission to the Bishops of *Winton* and *Exon*, to inquire *de legitima Nativitate* of *Agathe* the Mother of *Robert de Ardena*, and if she should be found legitimate, to restore him to the Possession of certain Lands, whereof he was dispossessed, being informed that the King of *England* was very much offended with this Commission, he revoked and countermanded it in Point of Restitution of Possession, acknowledging and confessing that the Establishment of Possession belonged to the King, and not to the Church; which Case is reported in the Canon Law. *Decretal, Antiquæ Collectiones* 1. lib. 4. Tit. *Qui filii sunt legitimi, cap. 4. & cap. 7.* In the 4 *Cap.* the Commission is set forth, and in the 7 *Cap.* the Revocation, or Countermand, appears in this Form: *Causam quæ fuit inter Fr. and R. de Ardena super eo quod mater jam dicti R. dicitur non fuisse de legitimo matrimonio nata, experientie nostræ commisimus terminandam verum, quia in literis nostris inseri fecimus ut præfat' R.*

*Godolp.*

*Reper.*

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possessionibus, quarum possessor extitit, facere-  
tis restitui si eadem possessione spoliatus esset,  
nos attendentes quod ad Regem, non ad Eccle-  
siam, spectat de talibus possessionibus judicare,  
ne videamur Furi & Dignitatibus charissimi in  
Christo filii Henrici Regis Anglorum detrabere,  
qui, sicut accepimus, motus & turbatus est,  
quod de possessionibus scripsimus, cum ipsorum  
Judicium ad se asserat pertinere, volumus  
quod Regi possessionum Judicium relinquentes,  
de Causa principali cognoscatis, &c. Dav.  
54. a. b.

2. It was resolved, that the Question of  
Bastardy or Legitimacy ought to be first  
moved in the Temporal Court of the King,  
and Issue there joined upon it, and then to  
be transmitted to the Ecclesiastical Court  
by the King's Writ, to be examined and  
tried there; and thereupon the Bishop is to  
certify to the King's Court; to which Cer-  
tificate, being duly made, the Law gives  
such Credit, that all the World shall be con-  
cluded and estopped by it; but, on the o-  
ther Hand, if any Suit of Bastardy or Le-  
gitimacy be first stirred in the Ecclesiastical  
Court, before any Question has been had  
of it in the Temporal Court of the King,  
Prohibition lies to restrain such Suit; and if  
it be accompanied with Practice or Fraud,  
as was in the principal Case, (*vide le Case*)  
it is a Misdemeanor punishable in the Star-  
Chamber. To this Purpose the Case of  
Corbet was put, 22 E. 4 Consultation, 6. which  
was, Sir Robert Corbet had Issue two Sons,  
Robert and Roger, Robert, the Son, being  
within the Age of fourteen, took to Wife  
Matild, and lived with her to his full Age,  
&

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Et cognati Et reputati sunt pro viro Et Uxore  
 palam. (publickly, or to all the World) yet af-  
 ter Robert, the Son, put away Matild, who  
 still living, he married Letice, and had Issue  
 by Letice a Son, and then Robert, the Son,  
 died ; after whose Death Letice preached  
 (or published) and declared publickly, that  
 she (Letice) was the lawful Wife of Robert,  
 and that her Son was Mulier and Legiti-  
 mate: Whereupon Roger, the youngest Son  
 of Sir Robert, commenced his Suit in the Spi-  
 ritual Court to reverse the Espousals be-  
 tween Letice and Robert, and to silence Le-  
 tice, &c. Whereupon Letice purchased a  
 Prohibition, and thereupon Roger shewed  
 this whole Matter, and prayed a Consulta-  
 tion, which was denied, chiefly upon this  
 Reason, (viz.) that the Intent of the Suit  
 in the Spiritual Court was to bastardize the  
 Issue between Robert and Letice, and to  
 prove Roger Heir to Robert ; and the Action  
 or Original to bastardize a Man shall not be  
 first moved in the Spiritual Court, but in  
 the Temporal Court, &c. And for the ma-  
 king this Point more clear, two Cases put  
 by Bracton, lib. 5. Tit. De Exceptionibus, c. 6.  
 were remembered. 1. B. having Issue by  
 an Heiress, which Issue was born before  
 Marriage, claimed to be Tenant per le Cur-  
 tesy ; but being for this Cause barred, in  
 Assise brought by him against A. he obtained  
 the Pope's Bull, and by Authority of that  
 he commenced a Suit in the Ecclesiastical  
 Court to prove his Issue legitimate, quod fa-  
 cere non debuit, as Bracton there says ; and  
 therefore a Prohibition went to stay this Suit,  
 shewing all the Matter, Et quod predictus B.



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ad deceptionem Curie nostrae, & ad infirmandum Judicium in Curia nostra factum, trahit ipsum A. in placitum coram vobis in Curia Christianitatis Authoritate Literarum Domini Papae ad praedictum puerum legitimandum, &c. Et cum non possint Judices aliqui de legitimat' cognoscere, n si fuerit loquela prius in Curia nostra incepta per Breve & ibi Bastardia objecta, & postea ad Curiam Christianitatis transmissa, vobis prohibemus quod in placito illo ulterius non procedatis, &c. In the same Chapter of Bracton, see the Form of another Prohibition, which made the Matter still more plain. Rex talibus Judicibus, &c. Ostensum est nobis ex parte A. quod cum in Curia nostra coram Justiciariis nostris Itinerantibus in tali Comitatu arrainavit quandam Assizam Mortis Antecessoris versus B. de quadam terra in N. idem B. timens sibi posse opponi notam Bastardiae in eadem Assiza, & ante praedictum adventum Justiciariorum & antequam ei Bastardia apponatur in Curia nostra in dicta Assiza, & antequam fuerit per nos ordinario loci Inquisitio de Legitimitate probanda, secundum Regni nostri consuetudinem demandata, Literas Domini Papae ad vos directas impetravit, ut de Legitimitate sua cognoscatis, & ad probationem illius testes admittatis, ut per hoc remaneat Haereditas & Successio contra Consuetudinem Regni quae hucusque obtinuit, ut approbata, & sede Apostolica confirmata, quod in Causa Successionis, & Haereditatis petitione, debet prius moveri Placitum in Curia nostra, & cum ibi objecta fuerit Bastardia tunc deinde transmitti debet Recordum loquela & cognitio Bastardiae ad Curiam Christianitatis, ut ibi ad mandatum nostrum de legitimitate inquiratur, quod quidem

*in hac parte non est observatum, Et cum hoc sit manifeste contra consuetudinem Regni nostri, quod habita vel habenda inter alios contentione de Jure Successionis, debeatis ad inquisitionem de legitimitate procedere antequam a nobis hoc fuerit vobis demandatum, vobis prohibemus, &c.* By which it is sufficiently manifest, that if the Ecclesiastical Court proceed to the Examination of Bastardy, or Legitimation, without Direction from the Temporal Courts, it shall be restrained by Prohibition, and if there be Fraud or Practice in such Proceeding, it is censurable in the Star-Chamber. And *Babington* Chancellor of *Litchfield's* Case, *Trin. 3 Jac.* is a direct Precedent in *Point. Dav. 51, 52, 53. Dy. 369. a.*

3. An Information was exhibited in the Castle-Chamber of *Dublin* against the Bishop of *K. and C. B.* and others, who by Practice and Combination between them, and by undue Course of Proceeding have endeavoured to prove that *C. B.* who had all along before been reputed a Bastard, to be the legitimate Son and Heir of *G. B. Esq;* to the Disinheriton and Defamation of *E. B.* who was the sole Son and Heir of the said *G. B.* And upon Hearing this Cause the Case appeared to be thus: About 26 Years before the Bill exhibited, the said *G. B.* had Issue the said *C. B.* on the Body of one *Fernis Damosel*, who, for so long as *G. B.* lived, was never reputed his Wife, but his Concubine, and the said *C. B.* was only accepted for the natural Son of the said *G. B.* and not for legitimate. After this, (*viz.*) 16 Years after the Birth of *C. B.* whose Mother was then alive, *G. B.* took

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took to Wife a Lady of good Estate and Reputation, with the Consent of Friends, and had Issue by her the said *E. B.* and died; after whose Death *C. B.* his reputed Bastard Son, nor his Mother, who is still alive, said nothing for the Space of 9 Years; but now lately they have practised and combined with the said Bishop of *K.* being of their Consanguinity, and many other, to prove the Legitimacy of the said *C. B.* by an irregular and undue Course, with Intent to bastardize and disinherit the said *E. B.* according to which Practice and Combination, without any Suit either commenced or being moved in any Temporal Court of the King, or any Writ directed to him to certify Bastardy or Legitimation in this Case, and what is more, without any Libel exhibited in his Ecclesiastical Court concerning this Matter, of his own Head secretly, and not *Convocatis convocandis*, some Years after the Death of the said *G. B.* took the Depositions of many, or several, Witnesses to prove the said *G. B.* nine and twenty Years before had lawfully married and taken to Wife the said *Jervis Damofel*, Mother of the said *C. B.* and that the said *C. B.* was legitimate Son and Heir of the said *G. B.* and these Depositions, thus taken, the said Bishop caused to be ingrossed and reduced into the Form of a solemn Act, and having signed and sealed the said Instrument, he delivered the same to *C. B.* who published it, and by Colour of such Instrument or Act declared himself to be the Son and lawful Heir of the said *G. B.* and for this Practice and Misdemeanor



meanor the said Bishop of K. and the Rest *Q.* What the  
were censured. *Dav. 51. a. &c.* Censure was,

very likely was purposely omitted by the Reporter, out of Regard to the  
Bishop's Character, and I am more inclined to think so, as I observe  
he only uses the initial Letters and no Name for the Bishop, but the first  
Letter of his See, and no Name at all to the Cause. since the same

6. *They must, on receiving the  
King's Command, proceed incontinently,  
notwithstanding any Appeal or Inhibition.*

**A**S the Ecclesiastical Judge may not inquire of Bastardy, or Legitimation, without the King's special Direction or Commandment, so when he hath received the King's Writ to make such Inquisition, he ought not to surcease for any Appeal or Inhibition; but ought incontinently to proceed till he hath certified the King's Court: And this also appears in *Bracton, lib. 5. De Exceptionibus, 14. Cum autem Judex Ecclesiasticus Inquisitionem fecerit, non erit ab eo appellandum, nec a Petente, nec a Tenente; a Petente non, quia talem Jurisdictionem & talem Judicem elegi; a Tenente non, quia sic posset causam in infinitum protrahere de Judice in Judicem, usque ad Papam, & sic posset Papa de Laico feodo indirecte cognoscere.* But this Point is still clearer from a notable Record (comprising a Case in Ireland). *In Archiv<sup>o</sup> Turris claus<sup>o</sup> 8 H. 3. memb<sup>o</sup> 29. in dorso, in this Form: Rex Dublin Archiepiscopo Justiciario Hybernæ Salutem: Ad ea quæ vobis nuper dedimus in mandatis, ut nobis rescriberetis, quatenus*

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Reper:  
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quatenus fuisset processum in *Causa Nicholai de la Felda*, qui contra *Abbatem & Canonicos Sancti Thomæ Dubliniensis* in Curia nostra, coram *Iusticiariis nostris*, petiit duas Carucas terras cum pertinentiis in *Kilredbery*, per *Assisam de Morte Antecessoris*, cui etiam coram eisdem *Iusticiariis* objecta fuit *Bastardia*, per quod ab ipsis *Iusticiariis nostris* ad vos fuit transmissum ut in foro Ecclesiastico de *Bastardia* sive *Legitimitate* agnosceretis: Nobis per *Literas vestras* significastis, quod cum in foro civili terram prædictam peteret per *Literas nostras de morte Antecessoris*, versus memoratos *Abbatem & Canonicos*, objecta fuit ei nota *Bastardiæ*, quare in foro eodem tunc non fuit ulterius processum: Memoratus etiam *Nicholaus de Mandato Iusticiariorum nostrorum*, in foro Ecclesiastico coram vobis volens probare se esse legitimum, testes produxit, & publicatis attestationibus suis, post diutinas alterationes & disputationes, tam ex parte *Abbatis*, quam ipsius *Nicholai*, cum ad calculum definitivæ *Sententiæ* procedere velletis, comparuerunt duæ *Puellæ* minoris ætatis, filiæ *Richardi de la Felda* Patris prædicti *Nicholai*, & appellaverunt ne ad *Sententiam* ferendam procederetis, quia in hoc manifestum earum verteretur præjudicium, eo quod alias præcluderent eis via petendi hæreditatem petitam, nec possit eis subveniri per restitutionem in integrum. Unde de consilio virorum prudentium (ut dicitis) appello deferentes, causam secundum quod coram nobis agitata est, Domino Papæ transmisistis instructam, de quo plurimum admirantes non immerito movemur, cum de *Legitimitate* prædicti *Nicholai* per testimonium productiones & attestationum publicationes plene vobis constiterit, vos propter appellatio-

nem puellarum prædictarum, contra quas non agebatur, vel etiam de quibus nulla fiebat mentio in *Affisa* memorata, nec fuerunt aliqua partes illarum in causa prædicta, Sententiam diffinitivam, pro eo distulistis pronunciare, & male, quia nostrum declinantes examen, id quod per nostram determinandum esset Jurisdictionem, ad alienam transferunt dignitatem quod valde perniciosum esset exemplo. Cum etiam si adeptus esset prædictus *Nicholaus* possessionem terræ prædictæ per *Affisam* prædictam, beneficium petitionis Hereditatis prædictis puellis plane suppetat in Curia nostra per breve de recto maxime cum per Literas de morte Antecessoris agatur de possessione, & non de proprietate, & ex Officio nostro in casu proposito nihil aliud ad nos pertinebat, nisi tantum de ipsius *Nicholai* Legitimitate probationes admittere, & ipsum cum Literis nostris testimonialibus ad Justiciarios nostros remittere. De Consilio igitur Magnatum & Fidelium nobis assistentium vobis mandamus, quatenus non obstante appellatione præmissa, non differatis pro eo sententiare, ipsum ad Justiciarios nostros remittentes cum literis nostris testimonialibus, ut de Loquela coram eis agitata postmodum possint secundum Legem & Consuetudinem terræ nostræ Hyberniæ Justitiæ Plenitudinem exhibere. Teste H. apud Gloucester, 19 die Novembris. See also to the same Purpose 39 E. 3. 20. a. where a Writ of Dower *Ne unques accouple en loial Matrimony* was pleaded, and Issue thereupon joined; whereupon Commandment was to the Bishop to certify, wherein he said, he could not certify by Reason of an Inhibition to him out of the Arches; this Return was held insufficient; for there



Inhibitions it is said, that he ought not to surcease to  
 not to be obey the Commandment of the King for no  
 granted *sans* Inhibition whatsoever. *Dav. 53. a. b. 54. a.*  
 Subscription of Advocate practising in the Court, or if no Advocate, then of a Proctor.  
*Can. 96.* Not to be granted till Appeal exhibited. *Can. 97.* Nor till  
 Promise and Subscription. *Can. 98.*

### 7. *Certificates of these Matters.*

#### 1. *What previously necessary thereunto.*

**W**HAT previously necessary to the Ecclesiastical Judge's Certificate of Bastardy, *vide Stat. 9 H. 6. c. 11. Rast. pl. fo. 29, 105, 161, 280, 577, 609.* Also see before *The Pope an Usurper. The Opposition the same have met with.*

#### 8. *What Evidence good in these Cases.*

**T**HE Party's own sole Confession, however taken upon Oath, either within, or without, the Court shall not have Credit; but the Truth, as far as possible, must be sifted out by Depositions of Witnesses and other lawful Proofs and Evictions. *Can. 95. Vide Comb. 137.*

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**9. Sentences of Separation and Divorce.**

**1. Where to be pronounced, and with what Solemnity.**

**N**O Sentence shall be given, either for Separation *a Thoro & Mensa*, or for annulling of pretended Matrimony, but in open Court and in the Seat of Justice, and that with the Knowledge and Consent either of the Archbishop within his Province, or of the Bishop within his Diocese, or of the Dean of the Arches, the Judge of the Audience of *Canterbury*, or of the Vicars General, or other Principal Officials, or *sede vacante*, of the Guardians of the Spiritualities, or other Ordinaries, to whom of Right it appertaineth in their several Jurisdictions and Courts, and concerning them only that are then dwelling under their Jurisdiction. *Can. 106.*

**2. The Cautions therein.**

In all Sentences for Divorce and Separation only *a Mensa & Thoro*, there shall be a Caution and Restraint inserted in the Sentence, that the Parties separated shall live chastly and continently, neither shall they during each other's Life, contract Matrimony with other Person; and for the better Observation of this last Clause, the

*Yet the Ecclesiastical Court may not examine the Party on Oath, whether he, or she, hath contracted Matrimony, or not, &c. for Nemo fidei tenetur se ipsum prodere.*

See *Clifford and Huntley's Case, Rol. Abr. Prohibition, (T) Case 6.*

said Sentence of Divorce shall not be pronounced until the Party or Parties requiring the same, having given good and sufficient Caution and Security into the Court, that they will not any Way break or trespass the said Restraint or Prohibition. *Can.* 107.

*10. The Judges in these Causes.*

1. *Their Neglect of, or exceeding in, their Duty, how punished.*

**I**F any Judge giving Sentence of Divorce or Separation shall not fully keep and observe the Premisses, he shall be, by the Archbishop of the Province, or the Bishop of the Diocese, suspended from the Exercise of his Office for the Space of a whole Year, and the Sentence of Separation so given, contrary to the Form aforesaid, shall be held void to all Intents and Purposes of the Law, as if it had not at all been given or pronounced. *Can.* 108.

*11. Appeals in these Causes.*

1. *General to.*

In Cases Matrimonial. 4 *Inst.* 339.



II. Matters Testamentary and Legatary, &c.

1. *The Authority of the Ecclesiastical Courts in these Matters, and from whence derived.*

I. IN all Countries, except *France*, the Probate of Wills was of Temporal Cognizance, which also may be in Court-Baron, where such Custom. *Gilb. 207. Dr. & Stud. lib. 2. c. 28. fo. 235.*

2. Testamentary Matters were originally of Temporal Jurisdiction. *Show. Rep. 158.*

3. The Probates of Testaments belong to Ordinaries *de Consuetudine Angliæ, & non de communi Jure. Rex Angliæ olim erat Confiliorum Ecclesiasticorum Præses, Vindex temeritatis Romanæ, propugnator Religionis, nec ullam habebant Episcopi Auctoritatem præter eam quam a Rege acceptam referebant, Jus Testamenta probandi non habebant, administrationis potestatem cuique delegare non poterant;* as Archbishop Parker says in his Book published *Anno Dom. 1573. Vide 9 Co. 38. a.*

4. The Probate of Wills did not originally belong to Ordinaries, but to the King, who seised the Deceased's Effects to pay his Debts, and advance his Wife and Children, &c. But after the Power was derived down to Ordinaries; but they neither ever had, nor have, any Power to give or sell the Goods, neither to dispose them to their own or other's Use, though in Danger of perishing, neither could or can release Debts

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due to the Deceased, neither have any Action, though liable thereto, &c. 9 Co. 37, &c.

5. Wills originally were merely Temporal. *Telv.* 92. 2 R. 3.

6. Probates of Wills did not belong to the Ecclesiastical Courts, but of late Time. 5 Co. *De Jure Regis Eccl.* 16. a. b.

7. The Jurisdiction of the Ecclesiastical Courts, touching Testamentary Matters, is by the Custom of *England*, and not by the Ecclesiastical Law. Lord *Gilbert* says, he does not find that any of the Canonists themselves pretend that Wills are of Ecclesiastical Cognizance *sua natura*, but only such Wills as were made for pious Uses. *Gilb.* 205.

8. In 11 H. 7. *Fineux* asserts, that the Probate of Wills did not belong to the Spiritual Courts by the Ecclesiastical Law, but came to them by Custom and Usage; and these are the Foundations on which my Lord *Coke* in *Henslow's Case*, 9 Rep. 38. concludes, that when the Will is proved in the Ecclesiastical Court, the Court has executed its Authority; but the Executors are to sue in the Temporal Courts to get in the Estate of the Deceased. *Gilb.* 207.

9. Though *de Jure communi* the Cognizance of Wills and Testaments does not belong to the Ecclesiastical Courts, but to the Temporal or Civil Jurisdiction; yet *de Consuetudine Angliæ pertinet ad Judices Ecclesiasticos*, as *Linwood* himself agrees. *Exercit. de Testamentis*, c. 4. in *Glossa*. So that it is the Custom or Law of *England* that gives the Extent and Limits of their external Jurisdiction

see p. 66. +

isdiction in foro Contentioso. *Hale's Hist. Law* 31, 32.

## 2. General to Wills and Testaments.

1. **U**ltima voluntas est legitima dispositio de eo quod quis post mortem fieri velit. *Swynb.* 18. *Orph. Leg. sect.* 2.

2. The Will hath Relation to the Testator's Death, and not to the Making; for till Death he is Master of his own Will. See the Case *Burk and Morgan*, 28 Jan. 1717, before the House of Lords.

## 3. Whether good or not.

1. **A** Will good, tho' no Executor named. 2 *Reports in Ch.* 112.

2. It is a good Will, tho' in the Form of an Indenture. 1 *Ch. Ca.* 248. *Nelson* 195. *le mesme Case.*

3. A Will not good, *sine animo disponendi*; nor a Testament, *sine animo testandi*. *Swynb.* 19.

4. A Will made in Writing, but not according to the Statute of Frauds, not good. 2 *Chan. Ca.* 127.

5. A Devise to one on Condition, and the Testator dies after the Devise made, but before the Condition written, this is a void Devise. *Comb.* 28. *Gilb.* 45.

6. A Feoffment is made to the Use of a Will; if the Will was declared, either before



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fore, or at the Time, such Will cannot be altered, because it is executed. *Fin. Law* 33.

7. A Will, wanting Witnesses, and so not good by the Statute of Frauds, will not operate as an Appointment to a Charity by the Statute 43 *Eliz.* *Prec. in Chan.* 270, 389.

8. A Testator, after having made his Will, makes a Feoffment, which he intends in Affirmance, this shall be taken as a Revocation. *1 Reports in Ch.* 42, 43.

9. A Will is made of Lands, before the Statute of Frauds, without the Number of Witnesses, or other Solemnity required by that Statute; though the Testator die after the Commencement of the Statute; yet this is a good Will, because it was so at first. *2 Reports in Ch.* 302. *Vide Prec. in Ch.* 77, 184, 270. *2 Vern.* 429.

10. A Will in *Dutch*, or *Latin*, must be so framed as to operate according to the Rules of our Law. *1 Vern.* 85.

11. An Infant at Seventeen may make a Will. *1 Vern.* 255. *1 Chan. Ca.* 157. *Nelf.* 383. Lord Gilbert says, an Infant Male may make a Will at Fourteen, a Female at Twelve, as they may at those respective Ages, consent or marry. *Gilb.* 74. *Vide Prec. Chan.* 316. *2 Mod.* 315. wherein they follow the Rule of the Civil Law of *Justinian*.

\* 12. A Will obtained *in extremis*, and upon Importunity of the Testator's Wife, his Hand being guided in the Writing his Name, was set aside. See Case *Monypenny* versus

versus *Brown*, before the House of Lords, 15 May 1711.

13. A Will was set aside after forty Years Possession under it, on Account of the Insanity of the Devisor, and that, tho' a Purchaser was in the Case. See Case *Squire and Pershall*, before the Lords, 24 Feb. 1726.

14. A Will, obtained by Fraud, was proved in the Spiritual Court; decreed, as to so much of the Will as subjected the Lands to Payment of Debts, should stand; but, as to the Rest, the Executor to be Trustee for the Devisee of the former Will. By Lord Chancellor; *but, as I take it, reversed before the Lords.* *Kirrick v. Blansby*, 11 March 1727.

15. Devise was of Lands to *A.* and after the Devisor devises the same Lands to *B.* who was a Papist, both Devises void; for though the last is void as a Will, yet it is good as a Revocation. See Case before the House of Lords. *Roper and Constable*, 11 July 1713.

16. *In Canc. Bennet and Bayly*, 15 June 1735, A Will obtained by Fraud, in taking Advantage of a Lunatick, decreed null. *Vide Gilb.* 181. *Hard.* 375. 3 *Rep. Chan.* 150, 155. 2 *Vern.* 612, 685, 293. *Prec. Ch.* 354, 459.

17. Lands devised to Charitable Uses, but the Will not published in the Presence of three Witnesses, as the Statute of Frauds requires, though not good, either as a Will or an Appointment, as to the Freehold; yet was good for so much as was Copyhold, they passing by Surrender, and not by the

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Will; and though there were three Witnesses to the Codicil, that would not help the Will. 2 *Vern.* 597, 598. See 3 *Mod.* 262. *Hob.* 136. *Moor* 888.

18. By Decree in Chancery, a Will of Lands attested by three Witnesses, who, at several Times, subscribed their Names at the Request of the Testator, but were not present together at once, is a good Will, within the Statute of Frauds. 2 *Chan. Ca.* 109. *Prec. in Chan.* 184, 270. 2 *Vern.* 429.

19. A Devise to Issue in *Ventre sa mere* good. *Dy. Read. sur le Statute of Wills*, fo. 6. *Vide Nelson* 267, 268.

20. A Devise of 10000 *l.* to procure a Dukedom to the Head of the Family by all lawful Means, so it be within a Twelve-month; Bill dismissed, as not being within the Year; but rather as Honour ought not to be purchased. 1 *Vern.* 22.

21. Words of Recommendation and Desire in a Will are always construed a Devise. *Prec. in Chan.* 201. *Vide* 1 *Chan. Ca.* 310. *Gilb.* 127, 128.

#### 4. Who may make a Will or Testament, and who not.

##### ~~1. The King.~~

1. *The King and Queen.*

~~1. The King. 2. The Queen.~~

##### ~~1. The King.~~

THE King of full Age may make a Will of Lands-Parcel of his Duchy of Lancaster, but of no other. *Dy. Readings on the Statute of Wills*, 1. 2. *The*



2. *The Queen.*

The Queen cannot make a Will, without the Consent of the King, neither can she devise to the King; though she may to a Stranger. *Dy. Readings upon the Statute of Wills, 1.*

2. *Femes Covert.*

A Feme Covert has Power given by her Husband to make a Will; the Probate thereof *per Testes* is sufficient, because, as to that Purpose, the Husband has made her a Feme Sole. *Prec. Chan. 84.*

3. *The Regular Clergy.*

Regular Clergy cannot make Wills. *Dy. Readings on the Statute of Wills, 2. Vide ante The Regular Clergy.*

4. *Bishops.*

1. A Bishop of his own Inheritance, or Purchase, may make a Will, as he also may of Arrearages of Rents of his Bishoprick; the same Law of a Dean or Parson. *Dy. Readings on the Statute of Wills, 1, 2.*

2. It appears by many Records in the Reign of *H. 3.* and *E. 1.* that by the Law and Custom of *England*, no Bishop could make his Will of his Goods or Chattels coming of his Bishoprick, &c. without the King's Licence. The Bishops, that they might freely make their Wills, yielded to give to the King, after their Deceases respectively for ever, six Things. 1st, Their best

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Horse

## Jura Ecclesiastica.

Horse, or Palfry, with Saddle and Bridle. 2. A Cloak, with a Cape. 3. One Cup, with a Cover. 4. One Bason and Ewer. 5. One Gold Ring. 6. His Kennel of Hounds; and for these a Writ issueth out of the Exchequer after the Decease of every Bishop; for Example: Rex, &c. *Vic' Ebor' Præcipimus tibi quod non omit' propter aliquam libertatem quin etiam ingred' & distring' omnes executores Testamenti & ult' voluntat' Reverendi in Christo Patris Mathæi nuper Archiepiscopi Ebor' defunct', ac Administratores & Occupatores bonor' & cattallor' quæ fuer' dicti nuper Archiepiscopi, nec non hered' & tenent' terrar' & tenementor', quæ nuper sua fuer', per omnes terras & catalla sua in baliva tua, ita quod nec ipsi nec aliquis ipso' ad ea man' appon' donec ad inde tibi præceperimus. Et quod de exitibus earundem terrar' nobis respond', & quod habeas corpora eorum coram Baronibus de Scacc' nostro apud Westm' a die Paschæ in tres Septimanas ad respondend' nobis de uno optimo equo sive Palfrido, Sella & Fræno, una Clamide sive Cloca cum Capella, uno Ciplo cum co-opertorio uno Pelve cum Lavatorio sive aquar', & uno annulo Aureo, nec non Muta Canum quæ nuper fuer' ejusdem nuper Archiepiscopi tempore mortis suæ, & quæ ad nos ratione prærogative nostræ spectant & pertinent, & de precio sive valore inde unde nobis nondum est respons'. Et habeas ibi tunc nomina executor' & alior' præd' & hoc breve.* 4 Inst. 338. Lord Coke says, the most antient that we find and remember, (but certainly says his Lordship there were such Writs before) is *Inter Memorand' de Scacc' anno 2 E. 2.* The Bishop of Bath and Wells's Case, *Trin 36 E. 3. ibid. inter —* The Bishop of Chester's Case, *Hill. 5 E. 4. ibid.*

*ibid.* adjudged upon Demurrer, That the Duty being to the King after the Decease of every Bishop, it extendeth to an Archbishop, *The Archbishop of York's Case*; for every Archbishop is a Bishop: It is called *Multura de Episcopis*, sometimes *Monutier*, &c. 4 Inst. 338.

## 5. Citizens of London.

*A Citizen of London could not make his Will in Derogation of the Custom of that City till the late Statute enabled him so to do.*

## 6. Infants.

1. An Infant may make a Testament at the Age of Seventeen. *Nelson* 383. 1 Chan. Ca. 157.

2. An Infant Male at Fourteen, a Female at Twelve, may make their Testaments. *Prec. Ch.* 316. *Vide Nelson* 383. *Gilb.* 74. 2 *Mod.* 315. Herein they follow the Civil Law of *Justinian*.

## 7. Persons outlawed and convict in Pre-munire.

### 1. Outlaws,

One outlawed cannot make a Testament, unless only outlawed in a personal Action, and then he may of his Lands, but not of his Goods. *Dy. Readings on the Statute of Wills*, fo. 2. *Vide Fi. Ley* 27.

### 2. Per-



~~2. Persons attaint in Premunire.~~

One attaint in *Premunire* cannot make his Will. Lord Bacon's Readings on the Statute of Uses, fo. 2.

## 8. Aliens.

An Alien makes his Will and after is Denizen, it is good. Dy. Readings on the Statute of Wills, fo. 3.

## 9. Jointenants.

A Jointenant cannot bar Survivorship by Will. Doct. & Stud. lib. 2. c. 25. Vide Prec. Ch. 120, 121, 124, 163.

## 10. Persons excommunicate.

An Excommunicate cannot make a Will. Cases in Law and Eq. 2 Part, fo. 113.

5. Of a Donation, *Causa mortis*.

## 1. What, and it Operation.

1. **D**Onatio, *Causa mortis*, is where a Man lies in Extremity, or being surpris'd with Sickness, and not having an Opportunity of making his Will, lest he should die before he can make it, gives his Goods, with his own Hands, to his Friends about him; this, if he dies, shall operate as a Legacy;

gacy; but if he recovers, the Property reverts. *Prec. Chan.* 269.

2. A Donation, *Causa mortis*, is in the Nature of a Legacy waiting on the Death of the Testator, and is ambulatory, and open, till that Time; and by a Revocation of all former Wills it is revoked; and a subsequent Devise is to be taken in Satisfaction of such a Donation; it is a Gift *in præsentis*, to take *in futuro*, &c. *Prec. Ch.* 300. See Cases in Law and Eq. 2 Part, *The Case of Mitford v. Lord Herbert & al.*

2. *Not favoured in Law.*

These Donations are not to be countenanced, or favoured, as it would open a Way to Fraud and Perjury; and therefore ought to be fully proved in all its Circumstances. *Prec. Chan.* 300.

6. *How, and by whom, Wills and Testaments are to be construed.*

1. **I**T is a Rule, that a general Clause in a Will is not to prejudice a particular Devise. *1 Rep. Ch.* 145.

2. *In Testamentis, ratio tacita non debet considerari, sed verba solum spectari debent. Multa possunt movere mentem Testatoris quæ nobis latent, ideo per divinationem mentis durum est a verbis recedere.* *2 Chan. Ca.* 155.

3. A Man devises several specifick Legacies, and (*inter al.*) to his Grandchildren, to be paid at Twenty-one, or Marriage, and after devises, that all his Legacies shall be paid

paid in a Year after his Decease. *Cur'*: The subsequent Clause, which seems to contradict the Payment of the Legacies to the Grandchildren, in Point of Time, must be so construed that it be not repugnant to the former Clause; and therefore the later Clause must relate only to the other specific Legacies given to the other Legatees, and not to the Grandchildren's Legacies. *Cases in Law and Eq. 2 Part, Adams c. Clerk's Case, fo. 154. Vue le mesme Livre, fo. 57, 58.*

4. The Will is to be taken together as one intire Scheme. *Acherley and Vernon's Case, Cases in Law and Eq. 2 Part, fo. 68 to 80. Vide ibid. fo. 77. Nelson 27.*

5. No Words are to be rejected that are capable of Signification. *Barker Ar. v. Ayres and Smith, Cases in Law and Eq. 2 Pt. fo. 157, &c. 1 Chan. Ca. 178. Poph. 131. Gilb. 11, 118, 133, 136, 209.*

6. The Testator's Intent is to govern, and artificial Reason not to be admitted. *Ibid. 1 Chan. Ca. 79, 80, 178.*

7. The Intent of the Testator is to be collected out of the written Words, and nothing is to be admitted in the Construction which is in any wise contrary to the Words; neither are Words to be rejected which may be reduced to any legal Construction; but if any Words are contrary to the Law, or insensible, such Words must be rejected. *Ibid. Vide And. 29. 3 Lev. 180, 181, 373. 3 Mod. 290. 2 Lev. 56, 156. 3 Cro. 52. 1 Cro. 356. Latch 40.*

\* 8. The Words in a Will, being ambiguous and capable of a Construction in Favour



vour of the Heir, is to be so construed. See *Sparrow* and *Shaw's* Case, before the House of Lords, 15 April 1729.

9. The Intention of the Testator is to be pursued in the Construction of Wills, as far as may be consistent with the Rules of Law. *Sparrow* and *Shaw*, *supra*.

10. The Devisor supposing he had Power to dispose the Inheritance, deviseth the same, and orders Incumbrances to be discharged thereout; if afterwards turning out that this Estate could not pass according to his Intention, it shall not (though in Favour of the Heir) be construed he intended to saddle his other Estate with these Incumbrances. See the Earl of *Tankerville* c. *Gray & al'*, before the House of Lords, 14 March 1728.

11. The Ecclesiastical Court may not translate a Will, but Equity will. 1 *Peer Will*. 527.

## 7. Executors.

### 1. Who are such.

UPON an *English* Bill in the Exchequer, the Case was, Several Executors were, and one proved the Will, the Rest refusing, and then he who proved it dies, and another took out Letters of Administration, and brought the present Bill. Held clearly by the Court, that by proving of the Will by one of the Executors, all are Executors; and tho' he who solely proved it be dead, yet none other Person can administer so long as any of the other Executors

cutors are living ; though they joined not in the Probate, neither ever acted in the Execution of the Will; and in the principal Case, it did not appear, that they who refused were dead ; so Bill dismissed. *Hard.*

III. *Vide* 9 Co. *Henslow's Case.* 21 E. 4. 1. Ven. 77. 1 Sid. 266. 1 Mod. 213. 21 E. 4. 23. *Office of Executors* 6. Dy. 160. 9 Co. 37. a. Salk. 3, 307, &c.

## 2. Relief amongst them.

1. *A.* and *B.* being appointed Executors, they both proved the Will, but only *A.* acts as Executor, and then dies, leaving his Wife his Executrix ; a Legatee sues *B.* in the Spiritual Court ; he is liable there, having joined in proving the Will ; yet *per Lord Keeper*, the Judgments of the Ecclesiastical Courts are as well subject to the Equity of this Court, as to Judgments at Law, and he inclined to give Relief in the particular Case, the Party being without Remedy ; for that the Delegates must judge according to the Ecclesiastical Laws. 1 Ch. Ca. 200. See *Prec. Chan.* 83. 8 Co. 136. *Cro. Car.* 373. *Plow. Com.* 184. Co. Lit. 264. *Foth.* 150. 2 *Vern. Ca.* 532.

2. Where one Executor, released alone without his Companions, he is accountable, whether he received the Duty or not. *Elf. Obs.* 104, 105, 107, 108. See 176, 177. *Salk.* 153, 154. *Telv.* 160.

3. An Executor not joining in the Probate, yet may come in before the Master to prove his Right. *Gilb.* 76. See *Gilb.* 80. 8 Co. 136. *Cro. Car.* 373. *Orph. Leg.* 71, 113.

*Plow. Com.* 184. *Swinb.* 5 Part, fo. 7. *Salk.* 153. 5 Co. 29. *Tot.* 158. *Nelson* 171, 410.

**3. Whether Trustee for next of Kin.**

1. The Residue undisposed of is to be distributed according to the Statute; there being Legacies to the Executors: And though the Will was not finished, yet the Presumption is, the Testator intended them no more. *Gilb.* 74, 75, 126, 184. *Vide* 200, 208, 209. 1 *Vern.* 473. 2 *Vern.* 648. *Prec. Chan.* 92. *Nelson* 351, 177, 178, 352.

2. The Residue belongs to the Executors where the same is expressly so given, notwithstanding other express Legacies. *Prec. Chan.* 94.

3. Devise of Lands to be sold to pay Debts, the Rest to go to his Executors, as Part of his personal Estate, and gives the Executors 100 l. Decreed, The Executors Trustees; for the Residue is to be distributed. *Prec. Chan.* 82.

4. One devises all his Books to another, except ten Books, such as his Wife should chuse, as Plays, Romances, Sermons, but not Law-Books; this is no Devise of Books to her, but an Exception out of the Devise of his Library, or Study; and it is not to be thought he intended to bar his Wife of the Benefit of the Executorship by so inconsiderable a Devise. *Prec. Chan.* 231. *Vide* 263, 264.

5. There are two Executors, and one has a beneficial Legacy, the other brings his Bill for Account of the personal Estate, and to have the Surplus; but decreed to take equally, notwithstanding the Legacy to one; for his



his Lordship said, the Question would rather be, Whether a beneficial Legacy to one should not exclude both Executors, because both but represent the Testator, and come in as one Person; and cited the Case of *Foster* and *Munt*, which he said had been somewhat shaken by the Case of the Duchess of *Beauford* and *Littlebury's* Case in the House of Lords; yet those were because the Legacies to the Executors were not beneficial, and so *Atkinson's* Case, at the Rolls, where 10*l.* for Mourning was but a Decency required on such Occasion; but in the principal Case, the Legacy was beneficial; but that not being the Case, he made no Decree concerning it, but that the Executors should come in equally, notwithstanding the specific Legacy to one. *Prec. Chan.* 324. *The Reporter* notes, if the Law be as hath been lately held, this seems no Contradiction to *Foster* and *Munt's* Case, which was decreed only on the Fraud in the Executor.

\* 6. Giving a Legacy to one Executor where are two, neither are thereby excluded; and Mourning is not to be deemed a Legacy to such Intent. *Vide* Case *Mason* and *Hawkins*, before the House of Lords, 4 March 1729.

7. *Upton* devised 50*l.* each to his two Sisters, and 50*l.* to his Neices, and makes them Executrices, without disposing of the Residue, it shall be distributed amongst the next of Kin, and not go to the Executrices; for Executors in these Cases are but Trustees. If he had intended them the Surplus, he could easily have said so. Since the Statute of Distributions Succession to perso-

*Law of Test.*  
410.  
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nal Estates was settled, &c. See Cases cited in this Case *Prec. Chan.* 566.

8. A Man, having a Daughter and two Brothers, made his Will, and thereby gave 5*l.* a-piece to his Brothers, appointing them Executors, but made no Disposition of the Surplus; on the Testator's Death, the Daughter, as next of Kin, libelled in the Spiritual Court for the Residue of the personal Estate, and as there was, (as was suggested) express Legacies given to the Executors, they ought to have nothing further; and in the Spiritual Court the Daughter obtained a Sentence for the *Residuum*; and from this Sentence the Executors appealed to the Delegates, and now moved in *Banco Regis* for a Prohibition to the Delegates. Lord Chief Justice *Holt* said, the Daughter not being residuary Legatee had no Pretence to sue for this Surplus in the Spiritual Court; and afterwards, on Debate, a Prohibition was granted; and yet on Bill in Chancery by the Daughter against the Executors, for an Account of the Surplus, she obtained a Decree, and that though there were Proof, that the Testator intended his Executors should have the Surplus, in regard that the Daughter had incurred his Displeasure, by having married against his Consent; yet there being somewhat doubtful, it was decreed first by Sir *John Trevor*, Master of the Rolls, and after by Lord Chancellor *Sommers*, on Appeal, That the Executors should be but Trustees as to the Surplus, after their Legacies paid; and that such Surplus should go according to the Statute of Distributions, and that it

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was dangerous to admit parol Proof, &c.  
1 Peer Will. 7, 8, 9.

- \* 9. *Selwin and Browne* in the House of Lords, 21 Mar. 1734. *John Brown* seised in Fee of a real Estate, and possessed of a considerable personal Estate, devised thereout several Annuities and Money Legacies to several Persons in the Will named, and gave a particalar Legacy of 500*l.* to one *Brown*, the Testator's Nephew, as also his Manor of *Hubbard's Hall* in *Essex* in Tail Male, Remainder to *William Selwin* in Fee, another of the Testator's Nephews, to whom he also devised his Leasehold House in *Bow-street*. And as for the Rest, Residue and Remainder of my Estate, whether real or personal, whereof I am seised or possessed, or which I am any Ways intituled unto, and which I have not herein and hereby before devised, given, bequeathed, or disposed of, I give, devise and bequeath the same, and every Part thereof, and all my Right, Title, Claim, and Interest therein and thereto, unto such my Executor or Executors hereinafter named as shall duly take on him or them the Execution of this my Will according to the true Intent and Meaning thereof, his and their Heirs, Executors, Administrators and Assigns, as Tenants in Common, and not as Jointenants; and made the said *Brown* and *Selwin* Executors, who accordingly took upon them the Executorship, and paid the Testator's Debts, Funeral Charges and Legacies, and divided equally between them great Part of the Residue of the Estate; but there being a Bond-Debt of 3000*l.* due from *Selwin* to the Testator, which he refused



fused to account for to *Browne*, as Part of  
 the Residue of the personal Estate of the  
 Testator, insisting, that the same was extin-  
 guished for his sole Benefit, by his being  
 made an Executor, *Brown* exhibited his Bill  
 against him for Relief, and particularly that  
 he might be paid Half the Money due for  
 Principal and Interest on the said Bond. On  
 hearing this Cause before his Honour the  
 Master of the Rolls, he was pleased to ad-  
 mit the Evidence of one *Vinar* (tho' objected  
 to) to be read, who drew the Will, and who  
 fully proved, that the Testator's Intention was,  
 that *Selwin* should have the sole Benefit of the  
 Bond, without being any Ways accountable for  
 the same to the other Executor; that his In-  
 structions were to draw the Will accordingly,  
 but that he told the Testator, there was no Oc-  
 casion to say any Thing about it in the Will;  
 for that, by making him Executor, he had ex-  
 tingished the Debt; and that he had advised  
 with Counsel on this Point, who told him, it  
 was a clear Case, and had been so adjudged in  
 Law; at which the Testator was well satisfied;  
 it was also admitted by *Brown* in his Answer  
 to a Cross-Bill, that both *Selwin* and *Vinar*  
 had, in the Testator's Life-time, told him that  
 this was the Testator's Intention, and particu-  
 larly that *Selwin* told him, that if he was not  
 satisfied herewith, in Order to prevent Disputes  
 hereafter, he might then ask the Testator about  
 it, but that he acquiesced in what they told  
 him, and said, he would pay great Regard to  
 the Testator's Intention. Upon this Evidence  
 and the Nature of the Case, the Master of  
 the Rolls decreed, that *Selwin* should have  
 an equal Moiety of the Residue of the Te-  
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flator's Estate, after Debts, &c. exclusive of the Bond, and that the same should be delivered up and cancelled. From this Decree *Brown* appealed to the Lord Chancellor, who also admitted the Proof, &c. (*ut supra*) to be read; but reversed the Decree, not thinking the Testimony of a single Witness, according to the Circumstances of the Case, sufficient to control what appeared on the Face of the Will. From this Decree *Selwin* appealed to the House of Lords, where the first Thing objected to by the Respondent was, the admitting *Vinar's* Evidence to be read; it was insisted upon by the Appellant's Counsel, that there were many Instances in the Courts of Equity, where parol Evidence had been allowed to be read, in Order to support the Construction of the Law, and rebut an Equity that might otherwise arise against the legal Operation of a Deed or Will; and for this were cited 2 *Vern.* 252. *Countess* and *Earl of Gainsborough*, and several other Cases. On the other Side it was insisted upon, as a settled Rule of Law, to reject all Proof brought to supply the Words of a Will, or to explain the Intent of the Testator; that this was the express Doctrine laid down and resolved in Lord *Cheyney's* Case, 5 *Co.* 68. and was the Opinion of my Lord Chief Justice *Holt*, in the Case of *Cole* and *Rawlinson*, 1 *Salk.* 234. where he says, that the Testator's Intent must be collected from the Words of the Will, and not from Circumstances, or any Matters *debors*; and that to ravel into the Affairs of the Testator would render Property precarious, and introduce Incertainty and Confusion into the

the Law it self; that this was not like admitting Evidence to ascertain the Person or Thing, as where the Testator had two Sons named *John*, and he devised Lands to his Son *John*; for in such Case, without admitting parol Evidence to shew which of his Sons he meant, the Devise must be void; but in the principal Case there is a Devise of the Residue of the Estate to the Respondant by plain Words in the Will. And the Question is, whether the Appellant shall be allowed by parol Evidence to prove a contrary Intention in the Testator? Which to permit would, they conceived, be contrary to the Rule of Law, and the exprefs Words of the Statute of Frauds and Perjuries, which enacts, *that no Will in Writing shall be repealed, nor shall any Clause, Devise, or Bequest therein, be altered or changed by any Words, or Will, by Word of Mouth only.* Upon the Counsel's withdrawing, Lord *Hardwick* for reading the Evidence, and decreeing on the Strength of it, said, that he thought the Evidence offered in the present Case was extremely proper, and what in like Cases was every Day admitted; that if, by making the Appellant Coexecutor, the Testator has effectually extinguished the Debt by Operation of Law, as if he had discharged it by exprefs Words; and if it only subsisted by the Notions of a Court of Equity, which arise from a Presumption, that the Testator did not intend by any Act in Law to extinguish the Debt, surely the Executor may rebut this Equity, by giving parol Evidence, that the Testator's Intent was agreeable to Law. So where the Testator gives



several Legacies, and, amongst the Rest, gives a Legacy to his Executor, without making any Disposition of the Surplus of the Estate, though in this Case the Law gives the Executor the Surplus; yet in Equity he shall be considered as a Trustee for the next of Kin; but, as this is by Implication and Construction only, the Executor has been allowed to encounter it by parol Evidence; and he thought the said Cases, on this Head, had gone as far, if not farther than the present one. Lord *Carteret*, against admitting the Evidence, said, there was no Case in which the Courts of Justice ought to be so careful in sticking to the Letter of the Law, as in the present; that Admitting this Evidence was going directly contrary to the Statute of Frauds, which bounds the Courts of Equity as well as the Common Law Courts, and would introduce that Perjury, Contrariety of Evidence, and other Inconveniences, which that Statute was made to prevent; that by giving Way to this Kind of Evidence their Lordships would constantly be troubled with reading the Depositions of unskilful Lawyers, who, to excuse and varnish over their own Blunders, would swear hard; that Nurses, Tenders and Apothecaries, and others, who may have bad Memories, and worse Consciences, would be affirming that for Fact, which was only a loose and unguarded Expression, or perhaps made use of by the Testator to controul and disguise what he was doing, or to keep the Family quiet, or for some other secret Motives and Inducements, which could not, after his Death, be found out. Upon  
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a Division it was carried by a great Majority, that the Evidence should not be read. The Day following the Cause came on to be further heard, when upon reading the Respondent's Answer, it was objected to that Part of it that related to what *Vinar* and *Selwin* told him, as to the Testator's Intention, and the Lords conceiving, that it was an Attempt, by a Side-Wind, to have that Evidence made use of, which they rejected the Day before, it was held to be contrary to that Resolution; and upon this Occasion the Lord Chancellor expressed an intire Satisfaction at the Resolution their Lordships came to in this Case. It was then insisted upon, that taking it upon what appeared upon the Face of the Will, the Decree ought to be reversed: That the Obligee, by making the Obligor one of the Executors, this Act of the Testator extinguishes the Debt; for the Debt consisting only of a Right to recover it by Way of Action, which one Executor cannot maintain against another, the Testator, by making the Debtor one of his Executors, does thereby discharge the Action, and consequently discharges the Debt, there is no Foundation to make a different Construction in this Case in Equity, where there are no Creditors, nor any Persons who are disappointed of their Legacies; and though it may be said, that the Testator has devised over the Residue of his Estate to both his Executors; yet this 3000 *l.* cannot be deemed Part of the Residue, being before extinguished. On the other Side it was said, that the admitting one Executor could not sue another at Law,

or that an Executor could not sue himself, which is the Reason why in some Books it is said, that the Obligee's making the Obligor Executor is an Extinguishment; yet it was never doubted, but that such a Debt remained Assets to satisfy Creditors; and in *Telv.* 160. it is resolved, that it shall be Assets to satisfy Legacies; and in *Salk.* 306. my Lord *Holt* says, that tho' the Action be discharged, yet the Debt is Assets, and the making the Obligor Executor does not amount to a Legacy. As therefore this Debt remains Part of the Testator's Assets, and as he has devised the same by the Name of the Residue of his Estate, such Residuary Legatee may sue for and recover the same in the Ecclesiastical Court, in the same Manner that a particular Legatee may recover his Legacy. And as the Courts of Equity have a concurrent Jurisdiction with Ecclesiastical Courts in Matters of this Nature, it is but fitting the Subject should have the same Measure of Justice, in which soever of those Courts he pleases to sue; And for these Reasons the Decree was affirmed.

*N. B.* I have been informed, That Lord Chancellor, at the Hearing before him, said the Evidence ought not to be read; being *dehors*, and against the Statute of Frauds. *To whom Surplus*, *Gilb.* 74, 81, 125, 184, 200, 208, 209, 280. *Nelson* 350. 1 *Vern.* 736, 473. 2 *Vern.* 571, 601, 602, 648, 736, 737. *Prec. Chan.* 82, 92, 94, 184, 231, 263, 324, 566. *Abr. Eq.* 246, 247. 1 *Vern.* 462. *Lord and Lady Gainsborough's Case*, *Littlebury's Case*, *Ball and Smith's Case*; *The Duchess of Beauford's Case*, *Gilb.* 127. *Comb.* 378. 1 *Peer Will.* S.C. 4. *Where*



4. *Where the King is Executor.*

When the King is made an Executor to another, he doth appoint certain Persons to take the Execution of the Will upon them, (against whom such as have Cause of Suit may bring Actions,) and appointeth others to take the Account. See *Parl Roll*, 15 H. 6. Catherine, Queen Dowager of England, Mother of H. 6. made her last Will and Testament, and thereof appointed that King her sole Executor, and thereupon the King appointed Robert Rawlinson, Cl. Keeper of the Wardrobe, John Marsden and Richard Alreed, Esquires, to execute the said Will under the Oversight of the Cardinal, the Duke of Gloucester, and the Bishop of Lincoln, or two of them, to whom they should account. 4 *Inst.* 335.

5. *The Executor's Assent to Legacies.*

1. Where Debts are unpaid at the Time, Assent to Legacies not good. 1 *Chan. Ca.* 257. See *Nelson* 461. *Orph. Leg.* 144. *Co. Litt.* 292. b. *Perk. sect.* 481. 4 *Co.* 28. *March* 137.

2. If the Spiritual Court attempt to compel the Executor to pay a Legacy, without Security to refund, a Prohibition shall go; for though this Court will compel a Legatee to refund at the Suit of a Creditor, or even of other Legatees, where there is a Deficiency of Assets; yet the Executor having once assented to a Legacy may be concluded. 1 *Vern.* 27, 93, 127, 162, 453, 455. 1 *Chan. Ca.*

Ca. 136, 137, 149, 271. 2 Chan. Ca. 119, 171, 132. Nelson 136, 381, 411, 422. Gilb. 87. Prec. Chan. 392.

6. *His Authority and Power over the Testator's Estate.*

1. *Before* } Probate.  
2. *After* }

1. *Before.*

1. An Executor may meddle with and dispose of the Goods of his Testator before Probate. *Bacon's Use of the Law* 67. *Vide Orph. Leg.* 144. *Co. Litt.* 292. *Perk. sect.* 481. 4 *Co.* 28. *Mar.* 137. 1 *Chan. Ca.* 257. *Nelson* 461.

2. Executors by the Will and Death of the Testator have all the Property of the Testator's Goods and Chattels, Leases for Years, Wardships, Extents, and all Rights concerning them, and the Executors may meddle with the Goods and dispose them before any Probate, but not bring any Actions. *Aliter* of an Administrator. *Use of the Law* 67. 5 *Co.* 28. *Nelson* 176.

2. *After.*

1. He may take his Testator's Effects, sell them, bring Actions, release, &c. may prefer himself to other Creditors, &c.

2. The Executors have their Title by the Testator, and the Testament, and not by the Probate; and the Probate of one Executor, where there are several, by the Com-

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mon Law shall enable all the Executors, tho' never so many, to sue; so that it is not the Probate, *the Act of the Ordinary*, which gives them any Interest, or Title, either to *Chose en Action*, or Possession; for they have their Titles and Interest by the Testament, and not by the Probate; so the Ecclesiastical Judge has no Power to take a Renunciation or Refusal of an Executorship. The Probate is nothing but a Confirmation or Allowance of what the Testator hath done.

9 Co. 37. b. 38, 40, 41. Moor 273. Go. 311. Ow. 44. 2 Bro. & Go. 58. 1 Leon. 206. Hard. 111. Tho. Jo. 72. Plow. Com. 280. 5 Co. 28. 2 And. 150. Hett. 77, 105. Hutt. 30. Trials per Pa. 13, 331, &c. 309, 326. 2 Keb. 610, 337. Ray. 405. Sty. 228, 346. 2 Show. 293. Comb. 46, 170, 185. Dy. 160, 367, 372. Fitz. Abr. 3, 148. a. 3 Keb. 344. 2 Mod. Ca. 90. 2 Rol. 263. 1 Keb. 567.

3. Upon an *English* Bill in Scacc. the Case was, Several Executors were, and but one proved the Will, the rest refusing, and then he who proved it dies, and another took out Letters of Administration and brought a Bill here; and held that, by proving the Will by one, all are Executors. 9 Co. Henflow's Case. 21 E. 4. Hard. 111. 1 Ven. 77. 1 Sid. 266. 1 Mod. 213. Dyer 160. Salk. 3, 307. 9 Co. 37. Office of Exec. 6.



7. *The Probate.*1. *General to.*

1. **T**HE Probate of Wills did not originally belong to Ordinaries, but to the King, who seized the Intestate's Effects to pay his Debts and advance his Wife and Issue, &c. but afterwards the Power was derived to Ordinaries; but they neither had nor now have any Power to give or sell the Goods, neither to dispose them to their own or another's Use, tho' in Danger of perishing, neither could, nor can, release Debts due to the Deceased's Estate; neither have any Action, tho' Actions lay against the Ordinary and his Committee, by Name of Executors, if they meddled with the Effects and did not pay Debts. *Stat. 31 E. 3. c. 11. 9 Co. 37.*

2. When the Will is proved in the Ecclesiastical Court, that Court hath executed its Authority; but the Executors are to sue in the Temporal Courts to get in the Estate of the Deceased. *Gilb. 207. Vide 9 Co. 38.*

3. A Will cannot be proved in the Ecclesiastical Court further than respects Goods; for in Regard to Lands, such a Probate will not avail; but the High Court of Chancery will prohibit their proceeding any farther than concerns the Chattels, as a Court of Law will prohibit their Proceedings in the Ecclesiastical Courts, in Matters cognizable at Law. *Practical Register.*

4. The

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4. The Probate of a Will is no Evidence in a Litigation for Lands either pro or con. in any Court at Law, but a Proceeding coram non judice; yet is it good as to Goods. Salk. 552, 553.

5. Every Bishop's Will is to be proved with the Provincial.

Vide 5 Co. De Jure Regis Eccl. 9. a.  
3 Bulst. 315. Latch 64. Palm. 416, 422.

2. To whom to be granted.

1. The Ordinary cannot refuse Probate to him, who is appointed Executor, though a Bankrupt, the Testator thinking him proper, and intrusting him; neither can the Ordinary insist upon Security; for as the Testator has thought him a fit Person, the Ordinary shall not adjudge him otherwise; he has a Temporal Right; though he cannot sue before Probate, and he is in by the Testator, and not by the Ordinary. Salk. 36, 299. See Show. 293, 294. 1 Vern. 200, 335.

2. In the Case of Death of the Testator before Probate, Administration must be *cum testamento annexo*. 2 Rep. Ch. 300.

3. If an Executor die before Probate, his Executor cannot prove it; but Administration *cum testamento annexo* must be granted to the Residuary Legatee, if any, or to the next of Kin. 1 Vern. 200.

4. The Plaintiff, as Executor or Administrator, out of an Inferior Court sought Relief for a Debt; the Defendant pleaded that there were *bona notabilia*; so that the Plaintiff could

could not discharge. Allowed *ex parte*. 3 Rep. Ch. 71.

5. Mich. 9 Geo. 2. B. R. Tacker and Towel. My Lord Chief Justice declared, that where a Will was made, and an Executor appointed, who after dies Intestate, his Administrator cannot be representative of the first Testator, and that in such Case Administration *de bonis non* of the first Testator must be committed. But an Executor of an Executor is a good Representative of the first Testator, the first having proved the Will.

See p. 79.

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### 3. The Necessity of the Will's being proved.

By the Court of Exchequer, no Relief here for a Legacy before the Codicil proved, (for in that Case the Will was proved, but not the Codicil, wherein 100*l.* which the Plaintiff owed the Testator, was given, and the Bill was to compel Probate, to stay the Suit on the Bond, and for Relief,) this is no proper Court to prove it in, but it belongeth to Court Christian; and Common Law hath nothing to do with it, but where the Ecclesiastical Law cannot determine, which in the present Case they may; but when the Codicil is proved, and made Part of the Will, then it will be proper for this Court to relieve on Account of the Legacy; but not till then; but because the Matter was not determined in the Ecclesiastical Court, this Court continued the Injunction till the Hearing there. And Lady Swynnerton's Case in Chancery was cited. Hard. 96, 97.



## 4. Where to be proved.

### 1. Where the Testator had no Assets in England.

One dying abroad and leaving no Effects in *England*, it was not necessary that his Will should be proved in *England*, no more than if a Man died and left an Estate in *Scotland*. 1 Vern. 297.

### 2. Bishops Wills.

The Probate of every Bishop's Testament, or granting of Administration of his Goods, though he had none, but within his own Jurisdiction, belongeth to the Archbishop. 4 Inst. 335. Vide Case Justice and Jones, postea, & quare.

### 3. Where Bona notabilia.

Vide post, Administrator and Administration. Vide etiam 1 Peer Will. 43, 44. 1 Sid. 179. Cro. Eliz. 718, 719. 5 Co. 29, 30. 8 Co. 135. For the Ordinary's Duty in such Case, see Can. 92, 93.

### 4. Where particular Custom.

1. The Probate of Wills may be in Court-Baron, where there is such a Custom. Gild. 207. 5 Co. 2 Pt. 73. b.

2. Cer-

2. Certain Lordships or Seigniories have the Probate of Wills by Prescription. *Doct. Stud. lib. 2. cap. 28.*

3. The Courts of divers Manors of the King and other Lords have anciently had the Probate of last Wills and Testaments; and it appears by 11 H. 7. that Probates did not appertain to the Ecclesiastical Courts, but of late Time. 5 Co. *De Jure Reg. Eccl.* 16. a. b.

Dr. Gibson, in his *Codex*, seems to me to slur Cu-

stom, when it thwarts Canon, as he thinks such Custom in its Beginning was an Incroachment; whereas I think every reasonable Custom is considered as Part of the Law; whilst Canon, if not received and used by Consent of King and People, is certainly Incroachment. And I apprehend, to maintain any immemorial Custom allowed by the Common Law to be an Incroachment, is an Impeachment of the Common Law it self, which allows such Custom.

### 5. Peculiar Jurisdictions

1. So called from the *French*, *Peculier*, that is private, proper, one's own. It is a Peculiar Parish, or Church, which hath Jurisdiction within it self for the Probate of Wills, &c. exempt from the Ordinary and Bishop's Courts. The King's Chapel is a Royal Peculiar, exempt from all Spiritual Jurisdiction, and reserved to the Visitation and immediate Government of the King himself; who is Supreme Ordinary. In the Province of *Canterbury* there are reckoned to be 57 Peculiars. It is an antient Privilege of the See of

Can-

Canterbury, that wheresoever any Manors or Advowsons do belong to it, they forthwith become exempt from the Ordinary, and are reputed Peculiars, and of the Diocese of Canterbury. Blount's Law Dict. *Peculiars*.

2. Where the Testator dies within any Peculiar Jurisdiction, the Probation of the Testament belongs to the Judge of the Peculiar. *Orph. Leg. 58*. See *The Bishop of Norwich* and *The Mayor of Thetford's Case*. Vide *Court of Peculiars, &c.*

5. *How far the Probate is good.*

1. Where a Will doth contain in it Lands and Goods, a Prohibition shall not go for the whole in general; but if in such Case it be alledged that the Party who made the Will was *de non sane Memoriae*, a Prohibition shall there be granted for the whole; but such Prohibition is not to be granted in all Cases where a Will contains in it a Disposing of both Lands and Goods; for then it would tend to hinder all Proceedings in the Ecclesiastical Court, which is not to be granted but in special Cases only; for the Law allows of a Probate; therefore before the Will proved an Executor cannot bring an Action. *Cro. Jac. 346*. Vide *6 Co. 23*.

2. A Prohibition was prayed to stay the Suit in the Spiritual Court concerning the Probate of a Will of Goods and Lands, which was alledged to be revoked, (and so proved.) On Suit at Law for the Land, on Issue *Non devisavit*, it was proved revoked *in toto*, and a *Non devastavit* found; and now Suit is in the Spiritual Court to find it a good



Will and not revoked; on this Suggestion the Court gave Day, if Cause were not shewn to the contrary, that a Prohibition should be granted; for the Court held, that if the Question had been in the Spiritual Court for a Probate of a Will of Goods and Lands, and making an Executor, that they should not proceed to prove the Will *quoad* the Land, but that a special Prohibition as to the Lands should be granted. *Cro. Car.* 94, 115, 166, 391, 396. 2 *Cro.* 279, 346. 3 *Cro.* 274. *Sid.* 246, 279. 1 *Ven.* 207. 1 *Mod.* 90, 211. 2 *Mod.* 315. *Salk.* 36, 552. 1 *Vern.* 256, 397. 2 *Vern.* 76. *Skin.* 174. 2 *Sid.* 143.

3. If a Man devises Lands and Goods, upon Suggestion that the Devisor *Non fuit compos mentis* at the Time of the Devise, a Prohibition shall be granted *quoad* the Lands only, and not *quoad* the Goods; because if it should be granted to the Goods, the Executor might not have an Action in the mean Time, *quod esset inconveniens*. *Pasch.* 14 Ja. B. R. *Rol. Abr. Prohibition*, fo. 315. (F) Case 1.

4. If a Man makes his Will of Lands only, and makes no Executor of his Goods by the same Will, but it is a distinct Will of it self, and is endeavoured to be proved in the Spiritual Court, a Prohibition lieth; because it is made devisable by the Statute 32 & 34 H. 8. and concerns real Things, whereof the Spiritual Court have not to do. *Hill.* 10 *Car. B. R. Bret and Netter, per totam Curiam* agreed. *Rol. Abr. Prohibition*, fo. 316. Case 5.

5. One deviseth, that his House, Lands and Goods should be equally divided by his Executors between his four Daughters, who were married; the Legatees sued for their Legacies in Court Christian, and the Executors prayed a Prohibition; the Lands and Houses not being testamentary, and the Court Christian not having Jurisdiction to compel the Executors to pay these Legacies; and the Will of the Testator was, that the Legatees should have the Lands and Goods in Hotchpot; so that the Execution of the Will being a Temporal Concernment, the Ecclesiastical Court might not meddle with the Execution of such Will; so a Prohibition should go for all. All the Justices agreed, that it would be mischievous to prohibit the Ecclesiastical Court for the personal Estate; because, as to that, the Execution belonged to them: And if we award a Prohibition as to them, we do not do Right to the Parties; and so the Executors ought to retain: But they unanimously agreed, that for the Lands and Houses wherein the Testator had a Freehold, the Court Ecclesiastical might not meddle with them, nor with the Money arising from the Sale thereof; because they are not testamentary; and therefore a Prohibition lies for so much, and the Legatees shall have Remedy in Chancery; wherefore they awarded a Prohibition for the Houses and Lands not testamentary, and not for the Goods; and *Hoghton* commanded, that a Clause should be put in the Prohibition, that they might proceed for the Goods. *Palm. 120. Vide Dy. 191, 264. b. 6 Co. 23. b.*

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6. By Lord Chancellor *Talbot*, a Will cannot be proved in the Spiritual Court, further than respects Goods; for in Regard to Lands, such Probate will not avail; but the High Court of Chancery will prohibit their Proceeding any further than concerns the Chattels; and yet the Ecclesiastical Court is the proper Place to discover and establish a Testament in, as well as to demand an Account of the personal Estate or Assets. *At Lincoln's Inn Hall, 7 April 1736.*

6. *Whether may be, and wherefore, and how, delayed.*

1. A Prohibition was prayed *Banco Regis* to the Prerogative Court to restrain their Proceedings there, in proving the Will of Sir *John Egerton*, who thereby had disposed of all his Personal and Real Estate, and disinherited his right Heir, and given nothing to any of his Grandchildren. The Ground whereupon this Motion was made to have a Prohibition to the whole Will, was in Regard it was intended to have a Trial at Law, whether a Will or not; and if they should be suffered to proceed and prove the Will there, and it be allowed there for his Personal Estate, it would then be a very great Evidence to induce the Jury upon the Trial to pass for the Will; therefore to prevent the Prejudice to the Trial, which afterwards was to be had in this Court, a Prohibition was prayed for the Whole; it was also further shewed, that Sir *John's* Daughters (during



ring the Suit for the Probate of the Will) had taken Letters of Administration out of the Prerogative Court for the Personal Estate, by which Act they had there in a Manner disallowed of the Will; and this the Court conceived to be very Strange, and granted a Prohibition for the Whole, both Lands and Goods; and that after the Trial here had, the same to be remanded to them as to the Goods. And this Difference was then taken and agreed for Law, by the whole Court, that where a Will doth contain in it Lands and Goods, the Court shall not grant a Prohibition for the Whole in the Generalty; but if in such a special Case it be alledged, that the Party who made the Will was then *De non sane Memorie*, a Prohibition shall there be granted for the Whole; but such a Prohibition is not to be granted in all Cases where a *Will* contains in it a Disposing both of Lands and Goods; for then it would tend to hinder all the Proceedings in the Ecclesiastical Court, which is not to be granted but in special Cases only; for the Law allows of a Probate there; because before the Will be proved an Executor cannot bring an Action. *Cro. Jac. 346. Vide 6 Co. 23.* So is Ro. Abr. 315. Case 6.

2. Upon a Suggestion for a Prohibition, from the Exchequer to the Spiritual Court, to stay the Probate of a Will for Lands and Goods, because the Testator was *Non compos*, *Atkins* argued, that upon such Suggestion as this, which goes to the whole Will, a general Prohibition ought to go; so upon Suggestion of a Revocation; otherwise where the Suggestion is particular and con-

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cerns the Land only; he cited 6 Co. 23. The Marquis of *Winchester's Case*, *Hob.* 290. *Serles* and *Williams's Case*, *Pasch.* 10 *Jac.* *Banco Regis*, *Semaine's Case*, 2 Cro. *Egerton's Case*. Cro. 1 Part 94, 114, 115, 165, 391. *Vide Dy.* 201. *Stephens* against the Prohibition, as to the Goods; and the Court declared, that unless the Plaintiff would go to Issue this Term, *Compos*, or *Non compos*, they would not grant a Prohibition. *Hard.* 131. *Mich.* 1658. Sir *Richard Minshal* and *Spicer*.

3. The Surmise was, on Motion for a Prohibition, that it concerned Lands; the Case was this: Will was proved in usual Form, and after the Plaintiff suggesting that the Testator had made another Will, and on Dispute thereupon, the Second was sentenced to be his Will; from which Sentence there was an Appeal to the Delegates; and now a Prohibition was prayed to them; for that the Testator had disposed of Lands by this Will, which *prima facie* is a good Ground of a Prohibition. 6 Co. *Mountagu's Case*, Cro. Car. *Bret* and *Netter's Case*, &c. *Hale* Ch. Baron, at first the Course was to grant a Prohibition upon all such Suggestions; and if on Trial it appeared that nothing was disposed of but Lands, then the Prohibition was perpetual, and in Case there was a personal Estate, and Executor in the Case, then a Consultation was awarded *quoad*, &c. Afterwards on Suggestion, that the Will concerned Lands and Goods, a Prohibition was used to be granted *quoad* the Lands; but of later Times, upon Suggestion, that the Will disposed of Lands, if the

the personal Estate were concerned likewise, they have used to deny a Prohibition; for that the Party is at no Prejudice by it, with Respect to the Lands; the Probate in the Ecclesiastical Court being no Evidence against him at Law for the Lands, whereas the Executor would be at Prejudice, if a Prohibition should issue; because then the Executor would be hindred from proving the Will, before which he cannot sue for any Debt due to his Testator's Estate, which might be a Means to diminish the Estate; *sed adjournatur*; but coming on another Day, many Precedents were cited for granting Prohibitions *quoad* the Lands; *sed per Hale Ch. Baron*, there ought to be no Prohibition on this Suggestion; because in this Cause before the Delegates the Suit is only to put the Party into a Condition of doing the same Thing the Plaintiff himself hath done already; (*Viz.*) to prove his Will, and is grounded upon an Act done by the Plaintiff himself; and if it were not prosecuted, the Defendant would have no Means of Proving his Will, being tied up by a Prohibition, which is unreasonable: But because the Plaintiff had brought his Action here to try his Title to the Land, and the Validity of the Defendant's Will, and offered to proceed in it with Effect, the Court ordered a Prohibition *quoad* the Lands, unless the Parties would consent to be concluded by the Probate. *Hard. 313. Vide Hard. 131. al mesne Purpose. Vide Nelson, fo. 403, 433.*

4. A Prohibition was prayed to the Spiritual Court to stay the Probate of a Will,



which contained a Devise of Lands, and several Legacies, suggesting this Matter, and that the Testator was *Non compos*; the Marquis of *Winchester's* Case, 6 Co. 23. was relied on; but the Court denied that Case, and said, that the Statute of H. 8. never intended to lessen the Jurisdiction of the Ecclesiastical Court as to the Probate of Wills, and to grant a Prohibition might be inconvenient; for without Probate, the Executor cannot sue for Debts, which by this Means may be lost and the Will unperformed; as for granting it *quoad* the Lands, it would be vain; because it is no Evidence, either *pro* or *con.* in any Court at Law, but a Proceeding *coram non Judice*; yet it is good as to the Goods. 2 Salk. 552, 553.

*Banco Regis, Hill. 3 Geo. 2. Justice and Jones.*

- \* 5. Mr. Reeve and Mr. Lee moved for a *Mandamus* to be directed to Dr. *Betsworth*, Judge of the Prerogative Court of *Canterbury*, to prove the Will of the late Lord *Londonderry*; and this Motion was founded upon an Affidavit, that this Judge had refused till a Commission of Appraisement executed, and cited a Case in *Raym.* 235. where the like Motion was granted; so the Court granted the present Motion without making any Rule to shew Cause, by Reason of the Inconvenience of a Delay in a Matter of this Nature; afterwards Mr. Reeve moved for a Rule upon the Doctor to return his Writ of *Mandamus*, the Return being out the Day before, to which Mr. *Strange* said, the constant Practice in these Cases is, only to grant four Days Rule; but

but the Court said, they knew of no such Practice, and accordingly ordered the Writ to be returned in two Days, and the Dr. now returned to the *Mandamus*, That the Law and Practice of the Ecclesiastical Courts was constantly to grant these Commissions, at the Request of any Creditor, upon his entering a Caveat against the Probate of the Will. Mr. *Willes* and Mr. *Strange* argued, that this Return was good. They said, that Commissions of this Sort were for the Benefit of Creditors, by which Means they have a sure Account of the Effects, to their Satisfaction; whereas otherwise they have only the Executor's own Oath, as to the Truth of the Inventory; but the Court declared they would not suffer Commissions of this Sort to delay the Probate of Wills; and that because till Probate, the Executor has not legal Power and Authority over the Effects, and in the mean Time the Effects of the Testator may be all wasted; and *Page Just.* observed, That *Mandamus's* have been allowed to enforce the Probate of Wills where the Ecclesiastical Courts insisted upon Caution; for that the Executor was a Bankrupt. Commissions of this Sort are at the Expence of the Assets and not of the Creditors, and the Court thought them of dangerous Consequence to delay a Probate. *Reynolds Just.* said, that where a Will is under Litigation, Commissions of this Sort are reasonable to protect the Estate, but here they put a Stop to a Man's enjoying the Benefit of a Right, which the Testator himself hath given him. Mr. *Strange* then excepted to the *Mandamus*, that it only

ly recited, that my Lord Londonderry died at *St. Christophers*, having *Bona & Catalla* in *Westminster*, and several other Places; and upon that commanded the Archbishop of *Canterbury* to grant the Probate of the Will; but did not set out that these Places are within the Province of *Canterbury*, and *Westminster* he said was a distinct Jurisdiction, and not Part of the Diocese of *London*; and the Court could not take Notice that it was Part of the Province of *Canterbury*; but besides he observed, that the Probate of the Testaments of all Persons dying in the foreign Plantations belongs to the Bishop of *London*; but the Court said, that it was resolved in the Case of *Adams* against the Tenants of *Savage*, that they are bound to take Notice under what Ecclesiastical Jurisdiction they sit. And they said, that it is true indeed, that where a Person dies beyond Sea, having no Goods, here the Bishop of *London* grants the Probate of the Will; but where there are Goods in one Diocese, the Archbishop has a Right of Probate, and accordingly the Court granted a peremptory *Mandamus*. 6 Mod. 154. The Court, by Way of a second Answer to this Exception, said, That the Judge by his Return had admitted his Exercising a Jurisdiction in the Probate of the present Will; and therefore they could not suffer him to except against having Authority to prove it. Vide 3 Cro. 106.

Vide post *Administration*, wherefore may be stayed.



## 7. Where Fraud or Practice.

### 1. Where to be tried.

1. Where a Will of a Personal Matter was obtained by Fraud, and by getting the Party to swear she would not revoke it; yet after Probate it is not to be drawn in Question in Equity; yet if the Party claiming under such fraudulent Will come into Equity for Relief, he shall not have it. 2 *Vern.* 76.

2. Administration is granted, where is a Will and Executor, though the Will was concealed, yet the Administration was absolutely void, and it is all one, though the Executor, when the Will appeared, refused to intermeddle, or if several Executors, and all dead before any Notice of the Will. See Case *Wangford* and *Wangford*, Term. Mich. 11 W. 3.

3. A Covenant and Bond was upon it to pay three of the Daughters of a Stranger 10*l.* each at their several Ages of twenty-four Years, and the Obligor lying sick made his Will, and in Performance of the said Covenant devised to each of the said Daughters 10*l.* to be paid at their several Ages of twenty-one Years; one of the Daughters, (to wit) *Margery Davis*, sued the Executor in Court Christian for her Legacy, and the Executor brought a Prohibition, suggesting that he is bound by the Covenant and Bond to pay it at Twenty-four; and if he should pay it now at Twenty-one; he is not discharged

charged of the Covenant; and shews further, that it was the Intent of the Devisor, that he should not be twice charged, but was an Election to the Executor, and if the Covenantees would release the Covenant, he would pay them according to the Will; and all the Court was of Opinion, that this was a good Suggestion to have a Prohibition, and took the Case to be in every Point as the Plaintiff had alledged. *Mo.* 246.

4. A Testator was got away by false Surmises, and a new Will tendred to him, which he was prevailed with by fraudulent Practices to execute; yet the Court would not set it aside. 3 *Chan. Cases* 61. See 87, 94.

5. *A.* the Plaintiff's Uncle had made his Will, and given the Plaintiff the greatest Part of his Personal Estate; but in his last Sickness his Maid-Servant had prevailed with him, being *Non compos*, to make another Will, and to marry her about a Week before his Death, at Six o'Clock at Night; though it was really proved by two Ministers, she was actually married before to the Defendant, and that he procured the Licence for the Marriage of *Archer* to the other Defendant, and that the Defendants suppressed the first Will, and that the Testator in his Health and Sound Mind knew the Defendants to be married; yet this fraudulent Will being proved, and the Matter merely of a personal Estate, his Lordship was of Opinion, that whilst that Probate stood, the Matter was not examinable in Chancery, and though the Fraud was fully proved

proved and read to him; yet he would not hear the same read, but dismissed the Bill. 2 Vern. 8, 9.

6. A Will of the Personal Estate was proved in the Spiritual Court; the Respondent having a former Will in his Favour, brings his Bill in Equity to discover by what Means the latter Will was obtained and for an Account of the Personal Estate, and to discover whether the Testator was not incapable and imposed upon; the Defendant demurred, because it belonged to the Spiritual Court only to prove the Validity of Wills, and the former Will was not proved in the Spiritual Court, as the Will in his Favour; but the Demurrer was over-ruled. See *Andrews and Powis's Case* before the House of Lords, 6 Feb. 1723.

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7. A Will obtained *in Extremis*, and upon Importunity of the Testator's Wife, his Hand being guided in Writing his Name, was set aside. See *Money Penny and Browne's Case* before the House of Lords. 15 March 1711.

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8. An Executor of a Will obtained by Fraud, though proved in the Spiritual Court, was decreed Trustee for the Devisee of a former Will. See the Case of *Skirrick and Bransby* before the House of Lords, 15 May 1711.

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9. A Will was obtained by Fraud in taking Advantage of a Lunatick, decreed null in Chancery, 31 Jan. 1735. *Qu. if not after affirmed by the House of Lords, as I think it was.* Vide *Gilb.* 181. *Hard.* 375. 3 Rep. Ch. 155. 2 Vern. 293. Pre. Ch. 459.

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*These are only cases of revocation.*



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10. *Mich. 9 Geo. 2. B. R. Tucker and Towel.*  
 Mr. *Agar* moved for a Prohibition to the Archdeacon of *N.* to stay a Suit there, for a Legacy, where the Case was, One *Eleanor Tucker* by Will gave the Legacy, which is the Ground of the present Question, and made *John Tucker* therein, for that Purpose named, her Executor of her said last Will; *John* proved the Will, and died; and there-upon Administration was granted to the Defendant below, who pleaded this Matter in Bar, which Plea the Ecclesiastical Court rejected; he said, he agreed, if Administration *de bonis non* had been granted to the Defendant, then the Suit against him had been regular; but as that was not the Case, but only a general Administration granted, he submitted it, that the Suit was improper; and my Lord Ch. Just. said, that undoubtedly the Law was so; yet his Lordship said, had the Court before admitted the Plea, he should have inclined to think that the Matter would have been more properly remedial by an Appeal than by Prohibition; however as the Ecclesiastical Court had rejected the Plea, a Rule was made to shew Cause, and Mr. *Fortescue* now coming to shew Cause, he submitted it, that whatever the Law might be in the Temporal Court; yet in the Ecclesiastical Court a Suit might well be instituted against the Administrator of an Executor, for a Legacy; to which Purpose he cited *Godolp. 258.* and *Swinb. Part 6. Page* . the last Edition; and if this was so, he contended, the Court, at least, might leave the Party to his Remedy by Appeal, and not interpose their Prohibition, and to  
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this Purpose cited *Rol. Rep. 10. Mar. 92. pl. 2.* and further he observed, that in the present Case the Libel set forth, that the Executors had Assets of *Eleanor Tucker's* in his Hand, sufficient to satisfy her Debts and Legacies, and that *John* and *Thomas*, the Sons of the Executor, had Administration committed to them of all the Goods belonging to the said Executor, at the Time of his Death; so that, as he said, the Defendant below appeared to be charged as Executor *de son Tort*; and if that was the Case, he submitted it, they were well liable; for which Purpose he cited 1 *Rol. Abr. 919. Letter A.* My Lord Ch. Just. declared, that it was certain that where a Will was made and an Executor appointed, who after dies Intestate, his Administrator can be no Representative of the first Testator, and in that Case that Administration *de bonis non* of the first Testator must be committed; and as to the Objection which has been made, that the Defendants appear to have been charged as Executors *de son Tort*, his Lordship observed, in the first Place, that in Fact this was not so; for though the Executor had sufficient in his Hands to satisfy the Debt of *Eleanor*; yet it doth not appear that ever any of those came into the Hands of the Defendants, and as to charging one as Executor *de son Tort* in the Courts of Common Law, he said, the Manner is not to charge them, that they were Executors of their own Wrong; (for that was held once to be bad on Demurrer) but they must be charged as Executors *Testamenti & Ult. Voluntatis*; neither is there any Way to charge Executors

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See p. 62.  
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*de son Tort* in the Ecclesiastical Court, but the Remedy is for the Administrator *de bonis non* to commence a Suit in a Court of Equity upon the Foot of a Breach of Trust and Fraud; and as to the Objection that has been made, that an Appeal is the proper Remedy, he said, in my Lord *Holt's* Time, an Executor was sued in the Ecclesiastical Court for an Account by a Person who was neither Creditor, nor Legatee; and it was objected thereunto, that an Appeal was the proper Remedy; but in that Case the Court said, he had been called into a Jurisdiction which had no proper Cognizance of the Matter, for which Reason they granted a Prohibition; the rest of the Court were of the same Opinion with my Lord in the particular Case, and accordingly the Rule was made absolute.

### 8. Of Revocations.

#### I. Of Wills.

##### I. General.

THE Revocation of a Will is a Matter merely Temporal, and discharges the Court Christian from having any Thing to do with it; it is in no Sort dependent upon the Will; for those Things are called dependent which go in Affirmance of the Will, and not which disannul and disaffirm it, as the Revocation doth; and a Revocation by our Law is sufficient before one Witness: And though the Court Christian hath

Power



Power of the Will, and of what is demanded thereby, namely, the Legacy, *yet, it is to be noted, that*, in its original Nature, the Will it self was Temporal, as appears by 2 R. 3. Testament, and Things which go in Abridgment and Restraint of the Common Law shall be taken strictly, and shall not be favoured in Construction; so that the Revocation being a Thing meerly collateral to the Will remains at Common Law, as to the Proof, as is 1 R. 3. *Telv.* 92, 93. See 9 Co. 37, 38.

2. Wills are ambulatory, and always changeable. *Hob.* 349.

3. Revocations are favoured for the Benefit of the Heir. *Mod. Cases*, 2 Part 71, 77.

4. Yet the Revocation of a Will is not to be intended no more than the Disinheritance of the Heir; but must be by the express Words. *Idem* 73.

5. As a Will is to be construed as one intire Act, though the Heir is to be favoured where the Case is doubtful; yet if a Man devise to one, and then by the same Will devise to another the same Estate, this is not to be taken as a Revocation, but that they are Jointenants, which shews that the Will is to be construed as one intire Clause, and not as different; and by this means Contradictions will be avoided in Construction thereof. *Idem* 77.

6. If a Testament be made of Lands and Goods, and a Suit is in the Ecclesiastical Court for the Goods, and the Question be, whether the Testator revoked the Will in his Life-time, or not, a Prohibition shall be granted *quoad* the Land, and not as to the

Goods. *Mich* 13 *Jac. Rol. Abr.* 315. (E).  
*Cases* 3, 4. *Qu. As the Question is a Revoca-*  
*tion, or not.*

\* 7. A Will may be revoked by a subse-  
 quent one, tho' such subsequent one be a  
 void one it self, yet it is good as a Revoca-  
 tion. See *Constable* and *Roper's Case* before  
 the House of Lords. *July* 11. 1713. *Pre.*  
*Ch.* 459. *Gilb.* 18. *Hard.* 375. 2 *Vern.*  
 293. 3 *Rep. Ch.* 155.

8. Privacy in making of a Will, or loose  
 Words to hide the Testator's Intent, or to  
 keep the Family quiet, &c. are not to be  
 regarded, much less to be taken to amount  
 to a Revocation. 3 *Chan. Cases* 81, 82, 87,  
 88, 117, 127.

2. *Whether good, and how far.*

1. *Where pro toto.*

1. *A.* makes his Brother his Executor, and  
 gives him all his Real and Personal Estate,  
 after the Testator marries, and by Codicil  
 made his Wife Executrix, she shall have the  
 Personal Estate, and not the Brother; for  
 the Devise was not to him by Name, nei-  
 ther as his Brother, but to his Executor.  
 1 *Vern.* 23.

2. If one having made a Will, and Du-  
 plicate, revoke either, this is a Revocation  
 of both; for they making but both one  
 Will, must stand or fall together. 2 *Vern.*  
 742.

2. *Where*

2. *Where pro tanto.*

1. Lands devised to one first, and after to another, in the same Will, the last Clause shall not revoke the first, but they shall be joint Devises. 1 Vern. 30. *So it is a Revocation only pro tanto.*

2. One devises in Fee, and then leases for Years to a third Person, this is only a Revocation *pro tanto*; but if the Devisor leases the Land to the Devisee, to commence after Testator's Death, this is a Revocation *pro toto*, as being inconsistent with the Devise. 1 Vern. 97.

3. A subsequent Mortgage is a Revocation in Law, but not a total Revocation in Equity. 1 Vern. 329, 342.

4. Devise was of Lands in S. to his Son A. for ninety-nine Years, determinable upon three Lives, and by the said Will charges these Lands with an Annuity of 40 l. a Year to his Daughter, and after demises the same Lands to — for ninety-nine Years, determinable upon three other Lives, reserving 50 l. a Year Rent, this is, during the Continuance of the Lease, a Revocation; but it is no Revocation as to the 40 l. a Year, there being Rent enough reserved to satisfy that. See *Packer and Lambe's Case* before the House of Lords, 14 April 1706.



## 2. Of Probates.

1. *Whether good Cause, or not, of Refusal.*

Upon a Motion for a Prohibition the Case was, *Hill* made *Mills* his Executor, who after became a Bankrupt, and being thereupon cited in the Prerogative Court, and there *ex tenuis* examined if a Commission of Bankruptcy was awarded against him; whereto he answering Yea, the Court revoked the Probate, and committed Administration, as it was agreed they might in the Case of Lunacy, or other natural Disability; but this Court was clear of Opinion that this Revocation is void, and that the Testator having trusted him, Bankruptcy is not such a Disability; but that he may continue Executor, *non obstante*; for the Testator's Estate is not liable to be assigned by the Commissioners, but remains subject to the Trusts in the Will, and a Man dying, having made his Executor, shall never be said to die intestate, so long as he has an Executor alive, who will intermeddle and has proved the Will, and therefore, though after a Sentence and Appeal brought, the Court granted a Prohibition. *Skin. 299.* *As the Ordinary had granted Probate to the Executor, I take it he had executed his Authority, and his pretending to revoke the same was a nude and void Act, as being extra his Jurisdiction, and as having nothing more to do in the Matter; he had performed his Duty in granting Probate to the Executor appointed by*  
the

*the Testator, whereto he had been compellable, had he refused or even delayed it, by Mandamus from the King's Temporal Court; and as he had done this Act which he was bound to as a Ministerial Officer to the Temporal Law, he had nothing more that he could do; for I take it he has no Power to judge of the Fitness of an Executor, for he comes in by Appointment of the Testator, and not by the Act of the Ordinary; the Ordinary indeed is the Conduit-Pipe, Instrument, or Mesne, to convey or derive down the Authority to the Executor; but he comes in by his Testator; for the Ordinary cannot possibly make an Executor to another Person.*

## 9. Of Renunciations of Executorships.

### 1. Good, or not.

1. **T**HE Probate of Wills did not originally belong to Ordinaries, but to the King, who seised the Intestate's Effects to pay his Debts and advance his Wife and Issue, &c. but afterwards the Power was derived to Ordinaries; but they had, *not* have, no Power to give, or sell, the Goods, neither to dispose them, either to their own or another's Use, though in Danger of Perishing, neither could, nor can, release Debts, nor have any Action, tho' Actions lay against them or their Committees, by Name of Executors, if they meddled with the Effects, and did not pay Debts. Now this Power being given to Ordinaries, is the

Reason that when some Executors refuse to act, and one or more of the Executors named prove the Will, still they who refused to act, may act notwithstanding, because the Power of the Ordinary is executed when the Will is proved, and the Ordinary hath not Power to take the Refusal of any one or more of the Executors to prove the Will. *Stat. 31 E. 3. c. 11. 9 Co. 37, &c.*

2. But Renunciation of an Executorship before the Ordinary is void; when he has proved the Will his Authority is executed, and the Ordinary has no Power to take the Refusal of any of the Executors who proved the same; but the same is an absolute nude and void Act. The Executors have their Title by the Testament, and not by the Probate. And the Probate of one Executor, where several, by the Allowance of the Common Law, shall enable all the Executors, though never so many, to sue; so that it is not the Probate which gives them any Interest or Title either to *Chose in Action*, or Possession; for they have their Title and Interest by the Testament, and not by the Probate; so the Ecclesiastical Judge has no Power to take a Renunciation, or Refusal, in such Case. The Probate is nothing but a Confirmation and Allowance of what the Testator hath done. *9 Co. 38, 40, 41. Mo. 273. Go. 311. Ow. 44. 2 Bro. and Go. 58. Plow Com. 280. 5 Co. 28. Dy. . 2 Mod. 150. Het. 77, 105. Hut. 30, 326. 2 Keb. 337. Raym. 405. Sty. 228, 346. 2 Show. 293. Comb. 46, 170, 185. 3 Keb. 344. 2 Mod. Cases 90. 2 Ro. Rep. 263. 1 Keb. 567. 2 Keb. 610. 1 Leon. 206.*



206. *Hard.* 111. *Tho.* 70. 72. *Trials per Pais* 13, 331, &c. 309, 326.

## 10. *Assets.*

### 1. *What are.*

1. **L** Ands, purchased in Trust, decreed Assets to satisfy Judgment Creditors. 2 *Rep. Chan.* 143, 62, 137. 3 *Vol.* 3. 26, 88, 217 to 222. *Eq. Abr.* 242, 275. 1 *Ch. Cases* 24, 128.

2. Lands devised to pay Debts are Assets in Equity. 3 *Rep. Ch.* 222, 23, 56, 78, 83, 85. 1 *Vol.* 222, 223. *Gilb.* 2, 3, 106, 122. *Eq. Abr.* 310.

3. But Lands devised to be sold are not to be any Part of the Goods or Chattels of the Deceased, by the Stat. 21 *II.* 8. c. 5. *So not cognisable in Court Christian.*

4. For Assets, by Descent, in the Hands of the Heir, see 1 *Vern.* 172, 410, 411.

5. Upon a Bill *in Scac.* the Court held clearly, That if Lands were devised to be sold by the Executors for the Payment of the Testator's Debts, the Money arising therefrom should be Assets in the Executor's Hands. *Hard.* 405. *Pas.* 17 *Car.* 2. *Burwell ver. Currant.* Vide 1 *Chan. Cas.* 14. *Nelson* 313. 1 *Chan. Cas.* 128. *Pre. Ch.* 39, 52, 58, 127, 136, 232, 286.

6. An Advowson real Assets in Equity to pay Judgment, Bond, and Simple-Contract Creditors. See Cases *Tonge* and *Beckets* con. *Robinson*, before House of Lords. 23 *March* 1730.

Vide plus 1 *Vern.* 45, 482, 453, 460, 469.  
 2 *Vol.* 104, 341, 357, 188, 189. 2 *Rep. Ch.*  
 152, 160. 3 *Mod.* 45. 1 *Vern.* 234, 282,  
 172, 419, 471, 28, 29, 63, 69, 99, 100,  
 101, 104, 432. 2 *Vern.* 134, 764, 188, 189,  
 341.

2. *How to be marshalled.*

1. Upon a special Report the Question was, in what Place a Debt decreed should take Place, in Relation to other Debts, in Point of *Priority*, and ordered a Decree should precede Bonds, and take Place next to Judgments, and the Case of *Parker* and was cited, where this was resolved. It was objected, that on Debt upon Bond, at Law, the Executor could not defend himself by pleading he had no Assets *ultra* what would satisfy the Decree; it was answered he might defend himself by Bill here in this Court, which would take Care to protect him therein. 1 *Vern.* 143.

2. After a Suit commenced here, an Executor shall not be allowed any Payment made voluntarily without Suit, and a Judgment confessed by an Executor, pending a Suit here, shall not be allowed. 1 *Vern.* 369. Vide 457.

## 11. Accounts.

### 1. Whether of Ecclesiastical Cognizance.

1. **P**AS. 3 Geo. 2. B. R. Hatton and Hatton.

The Court said, that they would in no Case suffer the Ecclesiastical Court to call an Executor to account for the *Residuum*, and before the Statute of Distributions they would not have suffered it, even in the Case of an Administrator, and they said, that that was one chief Occasion of the Statute, as appears by a very long Case at the End of *Raymond's Rep.* See 5 Co. de *Jure Regis Ecclesiastico.* 9. a.

## 12. Suits concerning these Matters.

### 1. General, to them

1. **I**N some Cases, Executors may sue one another, and in others not, in some, they must sue in the Ecclesiastical Courts, and in others, they have Remedy in the Temporal Courts. *Vide antea* Matters cognisable in the Temporal Courts, &c. *Orph. Leg.* 156. *Bro. Tit. Executor*, N<sup>o</sup> 98, 99, 104, 32. *Tit. Prohibition.* 36 H. 6. c. 7. 8 Co. 135. *Stat.* 2 R. 3. c. 17. *Stat.* 32 H. 8. c. 37.

### 2. How,



2. *How, where, and in what Cases, to be in the Temporal Courts.*

*Mich. 9 Geo. 2. B. R. Tucker and Towel.*

\* At Law one must not be charged as Executor *de son Tort*, but as *Executor Testamenti & Ult. Voluntatis*; neither is there any Way to charge Executors *de son Tort* in the Ecclesiastical Court; but the Remedy is, for the Administrator *de bonis non*, to commence his Suit in Equity on the Foot of a Breach of Trust and Fraud. *Vide antea* where Fraud or Practice. See this Division *supra*.

3. *Appeals in.*

In what Cases Appeals are to be made in Matters testamentary, see *Appeals*, &c. also 4 *Inst.* 339.

III. *Administrator and Administration.*

1. *The Ordinary's Authority.*

1. *Follows him.*

A Bishop of Ireland, being in England, committed Administration of the Goods of one who died Intestate within his Diocese in Ireland; and adjudged good. *Cro. Car.* 214.

2. *He*

2. He is but a ministerial Officer of the Law.

1. In Matters of Administration, the Ordinary is but a ministerial Officer of the Law, appointed by Statute, to execute the same *sub modo* the Directions thereby given to him, and is not at Liberty to grant Administration at his Will and Pleasure, and to whom he pleaseth, &c. 9 Co. 37, &c.

2. The Law could never intend to give Labour and Pain to the next of Kin to the Intestate in getting in and defending the Intestate's Estate, and for the Ordinary to have the Disposal of the Surplus, as was contended by Sir John Bennet, Judge of the Prerogative Court, who finding a Surplusage, would have compelled the Widow and Administratrix to have distributed to the next of Kin of her Intestate, not his Children, &c. Hob. 83.

3. If he refuse Administration to whom the same is due, how to be punished.

The Ordinary refusing Administration to whom due, lies liable to a Penalty. Cro.

Car. Wilson and Packman's Case. Dy. 339.

Orph. Leg. 177. Law Test. 477. acts done by the first Administrator (that is a Stranger to the Decedent) are valid —

but the Ordinary should not grant Admin. to a Stranger before the next of Kin, unless intimation be first published.

4. Where

4. *Where he hath the Deceased's Effects in his Hands.*

1. Ordinaries bound to pay the Debts of Intestates, as far as Assets will extend, as Executors should where are Executors appointed. *Stat. 13 E. 1. cap. 19. Reg. fo. 141. Fitz. Brief 822. Executor 77. Vet. N. B. fo. 61.*

2. If the Ordinary hath Goods in his Hands by Sequestration of one who dies Intestate, Debt is brought against him *sur un Obligation* made by the Intestate, the Ordinary may not dispose of any Parcel thereof to other Creditors at his Pleasure, but is obliged to satisfy the first Debt on which the Action is. *Et hoc per Opinionem Justic. in Hospitio Servient.* and this Question was moved for the Bishop of *Lincoln.* *Dyer 232. a.*

3. If a Man be indebted and die Intestate, or the Executor refuse to be Executor, so that the Goods come to the Ordinary's Hands, the Creditors may have Debt against the Ordinary by *Stat. W. 2. cap. 19. Fitzb. N. B. 120. D.* This Statute *cum post mortem alicujus* was made in Affirmance of the Common Law. *5 Co. 83.*

4. The Bishop cannot give Intestate's Goods, or release, or give express Authority so to do. *8 Co. 135.*



**2. Who to grant Administration.**

**1. Sede vacante.**

**T***Empore Vacationis* of an Archbishoprick or Bishoprick, the Dean and Chapter shall commit Administration. *Bro. Ab. Tit. Administrator and Administration, Case 46. Q. Vide post, whether good, void or voidable.*

**2. Where Bona notabilia; and here what so deemed.**

**1.** One having Goods in several Counties at the Time of his Death, the Administration belongs to the Archbishop, &c. *Quære* if this Word *County* should not be *Diocese*. *Bro. Ab. Administrator and Administration. Ca. 31.*

**2.** By *Keble, Finneux and Bryan*, where a Man dies intestate having Goods in divers Dioceses, the Administration shall be committed by the Metropolitan, and if the Bishop of the Diocese where the Party died commit Administration, this is void, and that, though the Metropolitan never committed Administration. *Bro. Ab. Tit. Administrator and Administration, Case 48.*

**3.** If a Man dies Intestate having *Bona notabilia* in *England and Ireland*, several Administrations shall be granted by the proper Archbishops, for the respective Goods in their several Dioceses.

**4. If**

4. If the Party dead had at the Time of his Death *Bona notabilia* in divers Dioceses; then the Archbishop of the Province where he died is to have the Probate of the Will, and to grant the Administration of his Goods as the Case falleth out; otherwise the Bishop of the Diocese where he died is to do it. Lord Bacon's *Use of the Law* 68. But if *Bona notabilia* be in both Provinces; then the Archbishop of *Canterbury* shall prove the Will, or grant Administration, as the Case may require. 8 Co. 135. Cro. Eliz. 472. Hugb's *Abr. Administrator*. Lit. Sect. 69. Plow. Com. 281. Bro. Tit. *Executor* 129, &c. Orph. Leg. 144, 145.

5. Where the Personal Estate lies in both Provinces, Administration must be granted by the Archbishop of *Canterbury*. Cro. Eliz. 472. Dy. 305.

6. If a Man dies on a Journey, Goods with him shall not make *Bona notabilia*.

7. If a Man leaves *Bona notabilia* in several Dioceses of the same Province, there must be a Prerogative Administration. If one leaves *Bona notabilia* in two Dioceses of the Province of *Canterbury*, and in two Dioceses of the Province of *York*, there must be two Prerogative Administrations; but if he leaves *Bona notabilia* in one Diocese of *Canterbury* and in one Diocese of *York*, then the Administration must be in both Dioceses. Salk. *Administrator*, *Quere* and *vide antea* Case 4. *etiam* 8 Co. 135, &c.

8. Upon a Bill in Equity the Case was, that Sir *Edward Wittington* died possessed of a Personal Estate in both Provinces, and his Will was proved in the Prerogative Court

of Canterbury, and upon a Suit there for a Legacy, there was an Appeal after Sentence, and after that, Administration was granted of his Goods within the Province of York, from which there was an Appeal; and pending these Appeals, the present Bill was brought in the Exchequer Equity, to discover the Personal Estate of the Intestate, and an Agreement to have Administration; to which the Defendant pleaded the Administration granted of the Goods within the Province of York, and concluded generally, whether he ought to make Answer to any the Matters contained in the Bill, in any other Manner. *Et per Curiam* clearly, where there are *Bona notabilia* in both Provinces, there must be several Administrations; so is 33 H. 6. and Administration granted in one Province is void as to the Goods in another; because there are distinct supreme Jurisdictions; and they held the Plea good, as to those Goods: And that the Appeal, if brought within fifteen Days, suspended the former Sentences, and they were clearly of Opinion, that the Conclusion extended to make it a Plea to the whole Bill, though the Matter of the Plea was special; and therefore, that as to what was not contained in the Plea, the Defendants ought to answer; and so it was awarded. *Hard. 216.*

Appeal, it's Effect.

What to be deemed *Bona notabilia*, &c. Vide *Orp. Leg. 69, 71, &c. 4 Inst. 74. Dy. 58, 305. Perkins 489. Ro. Ab. 909. 4 Leon. 211. 1 Sid. 179. Cro. Eliz. 718, 719. 5 Co. 29, 30. 8 Co. 135. a. 3 Rep. Chan. 71. 1 Pe. Will. 43.*



3. *Where Custom or Prescription.*

Certain Lordships or Seigniories have, by Prescription, the Probate of Testaments within their peculiar Limits. *Doct. & Stud. Lib. 2. cap. 28.*

4. *Whether it may be, and wherefore, and how delayed.*

1. Whilst an Executorship is under Litigation the Ordinary cannot commit Administration. *Orph. Leg. 64.*

\* 2. *Mich. 7 Geo. 2. Banco Regis. Anonymus.*  
Mr. *Strange* moved for a *Mandamus* to be directed to the Judge of the Ecclesiastical Court, requiring him to grant Administration to the Residuary Legatee, the Executor having renounced; the Will, he said, was of one Mr. *Kinaston*, who left two Sons, one of which he had made Residuary Legatee, and the Judge of the Ecclesiastical Court has refused granting Administration, till he has had a Return made to a Commission of Appraisement, which he has issued forth: In the Case of Lord *Londonderry's* Will. *Hill. 3.* of the present Reign, the Ecclesiastical Court refused to grant Probate, till such Commission returned, and there the Court ruled such Commission to be illegal, and granted the *Mandamus sans Rule* to shew Cause; he said, he remembered lately, before the Court of Delegates, the Civilians on all Hands agreed, that the

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Course

Course of their Courts is constantly to grant Administration to the Residuary Legatee, where the Executors renounce, and he submitted it, that the *Mandamus* was equally reasonable in the present Case. But the Court thought that the present Case much differed from that cited; in the Case cited the Party had a Right by the Common Law, to have the Probate; and therefore it was proper for the Court to grant their *Mandamus*, that the Common Law Right should be executed: But in the present Case, at most, has only a Right to Administration, by the Rules of the Ecclesiastical Court; and therefore it was not proper that this Court should interfere, by granting a *Mandamus*; however a Rule was made to shew Cause; and Dr. *Straughan*, coming now to shew Cause, said, that the granting Commissions of Appraisement, in these Cases, is agreeable to the Course of the Ecclesiastical Courts, but as soon as the Commission was returned, Administration with the Will annexed would be undoubtedly granted. The Commission, he said, in the present Case, was a Commission of Inspection, as well as Appraisement, in order to inspect the Papers of the Deceased, and likewise that the Personal Estate may be appraised and inventoried. My Lord Chief Justice said, in these Cases of Administration, the Court would not interfere by granting their *Mandamus*, but where the Party applying for Administration is intitled to it by some Act of Parliament; or where the Ecclesiastical Judge is unreasonably dilatory in his Proceedings; which his

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Lordship did not think was any Ways the present Case, and accordingly the Rule was discharged. *Mich. 7 Geo. 2. Banco Regis, The Earl of Suffolk's Case.*

\* 3. This was upon a Rule to shew Cause, why a *Mandamus* should not be directed to Dr. *Betsworth*, Judge of the Prerogative Court, requiring him to grant Administration of the Goods of the late Earl of *Suffolk*, to the present Earl, the Countess Dowager having renounced; Dr. *Henchman* said, the State of the Fact was, That 17 Oct. last, being soon after the Death of the late Earl; a *Caveat* was entered by his Creditors, on the second of *November* last the Countess Dowager executed a Deed, thereby renouncing all Right and Title to the Administration: Her Proctor produced this Renunciation before the Officer, and he admitted it; whereupon the Creditors withdrew their *Caveat*. On the 13 *Novemb.* Complaint was made to Dr. *Betsworth*, that the Renunciation ought to have been on Oath; and that the *Caveat* therefore was withdrawn upon Surprise. Whereupon the Doctor ordered, that the Countess either exhibit an Inventory, or declare upon Oath, that she had not intermeddled with the Effects, before the Renunciation should be admitted; and that when she had so done, and not before, Administration should be granted to the now Earl. Upon this State of the Case the Doctor submitted it, that the Proceedings below, were very regular; and therefore the Rule ought to be discharged. To which my Lord Chief Justice said, he did agree that the Ecclesiastical Judge had a Power to ob-

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ject to the Security which any Person shall offer who prays Administration; and therefore his Lordship said, a *Caveat* was very proper for that Purpose; however he said further, he did not know, in the present Case, the Judge of the Ecclesiastical Court had any Method of compelling the Countess Dowager to deliver in such an Inventory, or to make such an Oath; and therefore his Lordship said it was, that he could not think that the Administration could be delayed to be granted till that Time; for which Reason his Lordship declared, he thought the *Mandamus* ought to go: The rest of the Judges concurring with his Lordship, Rule was *per tout le Cure* for the *Mandamus* to go. Page Just. said, in Case where there is a Will, he agreed that a Renunciation of the Executor is necessary, because he hath something in him before Probate, but the Widow or next Kin have nothing in them before Letters of Administration granted; and therefore in such Case he could not think a Renunciation was reasonable. *Probyn* Just. (now Chief Baron) said, that Dr. *Betsworth* himself has ordered, that in Case the Countess renounces, the Administration shall be granted to the present Earl; therefore he said, now the *Mandamus* is proper to direct that the Administration shall be granted to the present Earl by Name; otherwise it might properly have been excepted to the *Mandamus*, that it ought to have been general. *Lee* Just. (now Lord Ch. Just.) said, that he thought it very proper that Dr. *Betsworth* should make a Return to this Writ; accordingly the Rule was made absolute.

5. *Whether Administration be good, void, or only voidable.*

1. Administration granted by the Archbishop, or the Guardian of the Spiritualities *sede Vacante*, tho' there are not *Bona notabilia*, is only voidable, and if the inferior Ordinary grant Administration before the former by the Archbishop, &c. are revoked, such second Administration is void; for to allow of such second Administration, before the former revoked, would breed Confusion, nay, though the former Administration is revoked, yet is not the second made better, *Quia quod in initio non valet, tractu Temporis non convalescit.* 8 Co. 135.

2. As the Ordinary cannot himself give the Intestate's Goods, neither release Debts due thereto, &c. so it is he cannot give express Authority to another so to do. 8 Co. 135. *For this would be to allow the Ordinary by himself or his Agent, to do a tortious Act; whereas all Wrong and Injury is odious in Law.*

3. It was adjudged between *Vere* and *Jeferies*, if the Metropolitan grant Administration where the Intestate hath not *Bona notabilia* in divers Dioceses, this is voidable but not void; but it was held clearly, that if the Bishop of a Diocese grant Administration which belongeth to the Metropolitan, it is absolutely void. *Mo.* 145. *pl.* 228.

4. Metropolitan, upon Supposal of *Bona notabilia*, where in Reality there is none, grants Letters of Administration; yet such Admi-

Administration is not void, but voidable only; because he hath Jurisdiction over all the Dioceses in his Province; but if the Ordinary of an *Inferior* Diocese commit Administration, where are *Bona notabilia*; because he hath no Jurisdiction, in such Case, it is absolutely null and void. 5 Co 29. b. Cro. Eliz. says Administration is absolutely void in both Cases; *tamen Quere*; for I conceive the Law to be with Lord Coke and Serjeant Moore.

## 6. Administration Bonds.

### 1. Must be as the Statute directs.

1. In the Prerogative Court, Sir John Bennet, the Judge, according to the Custom, had taken Bond of one *Slawney*, on granting Administration, on the Conditions usual there, one whereof is, That the Administrator shall dispose the Surplusage of the Goods, after the Debts and Legacies paid, according to the Direction of that Court; whereupon the Intestate having left a Wife, to whom Administration was committed, this Judge now found a Surplusage in her Hands, and sentenced she should give certain Portions to certain of the Kindred of her Husband, being not his Children; whereupon she prayed a Prohibition, and the Court was clear of Opinion, That whereas the Statute 21 H. 8. appoints the Administration to be granted, &c. and that the Ordinary shall take Sureties for the Administration of the Goods of the dead, that



he may not impose any other or further Condition upon the Bond; and though he will pretend that the true Administration mentioned in the Statute is to be extended, as well to the Disposition of the Surpluses, as to Debts and Legacies; yet that is not under their Judgment; for they must take their Bonds according to the Law, and when it is sued, the Meaning and Exposition of the Statute, and the Obligation and Condition are to be judged by the Courts of Common Law. And if a Man observe well the Statute, he shall perceive that by preferring the Wife and Children to the Administration, the Statute imitates the Mind of the Intestate to prefer them, that it is likely he would have preferred, if he had made a Will, which must be by giving the Profit of the Estate to them, and not Labour and Dolour, in suing and being sued, to bring in and defend the Estate, and then, after all, to give this vast Power to the Ordinary to give the Surplusage where he will. To which Opinion and Reason the rest of the Judges did incline; but yet the Cause, with the Consent of Sir *John Bennet* himself, was referred to the Order of Serjeant *Harris* and *Hutton*, who were of Counsel for the Prohibition. *Hob. 83. vide 250. also Thorpe's Readings in Gray's Inn, in August Anno 1641. sur le Statute 31 E. 3. vide Pal. 527.*

7. *To whom Administration to be granted, and with what Caution.*

It is provided by the Statute 31. E. 3. That when one dies Intestate, the Ordinary shall

shall make Deputies of the next of Kin, and truest Friend to the Intestate, to Administer his Goods and Effects, who shall bring Actions, &c. and his Refusal thus to grant Administration, is a Contempt to the King, and Injury to the Party; so that he is not at Liberty to grant Administration at his Will and Pleasure, and to whom he pleases, for he is but, *as I take it, a Ministerial Officer of the Law, created thereby, quoad hoc, and appointed to execute the same sub modo the directions thereby given him.* 9 Co. 37, &c.

*Law Test: p. 453.*

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2. By the Statute 21 H. 8. c. p. 5. Bishops are impowered to grant Administration to the Wife, or next of Blood to the Intestate, and by the same Statute where divers demand Administration, being of equal Degree, there indeed the Ordinary hath his Election to accept any one or more of them so equally intituled 9 Co. 37, &c. *But I conceive he may not, under any Notion or Pretence of his own, by Colour of the Words, Truest friend of the Intestate, mentioned in the Statute, wave the next of Kin in Favour of any other; for these Words being general and uncertain, and the next of Kin certain, who is the truest Friend, must be by Construction on the Statute, and what was the Meaning of the Makers of the Statute, and that is not a Matter within their Province to determine; the Construction of Acts of Parliament, tho' concerning Ecclesiastical Matters, nay, Ecclesiastical Persons and their Jurisdiction itself, belonging to Temporal Authority to settle, and not to these Lesser and Subordinate Judges.*

*+ Law Test: 462.*

## Jura Ecclesiastica.

3. If an Administration be granted to a Cousin of the half Blood, and hereupon a Suit is by another, who pretends himself a Cousin of the intire Blood, where his Father was a Bastard by our Law, and an Appeal is to the Audience, and there they intend to repeal the first Administration, and to grant it to the Son of the Bastard according to the Ecclesiastical Law, a Prohibition lies; because the Statute is to be interpreted according to our Law. *Hil. 22 Jac. Banco Regis*, Prohibition granted. *R. Abr.* Prohibition 303. *Case 28.*

4. If an Administration be granted to the next of Blood, and thereupon an Appeal is sued to the Delegates, and there they intend to revoke the Sentence, and to grant it to another, not so near of Blood by our Law, but is by the Ecclesiastical Law, a Prohibition lies, because it being ordained by Statute ought to be interpreted according to our Law, *Mich. 21 Jac. B. R. Wingate and Fitch*, and a Prohibition; because Administration was granted to a Brother of the Half Blood, and on Appeal to the Delegates they were inclined to repeal it, and to grant it to the Brother of the Whole Blood, and the Prohibition was granted to try their Law upon it, by our Law. *Ro. Abr.* Prohibition 303. *Case 27.*

5. *Carolus*, Duke of *Suffolk*, had Issue a Son by one Venter, and a Daughter by another, and devised Goods to the Son and died, and after the Son died Intestate without Wife or Issue, and the Mother of the Son, who was of the second Venter (for the



the Daughter was of the first Venter) administered by the Statute 21 H. 8. which is, that Administration shall be committed to the next of Kin of the Intestate; and upon Grand Argument in the Spiritual Court, *tam per Legis peritos Regni, quam peritos Legis Civilis*, the Administration was revoked; & sic Vide, That Administration might be revoked, & sic fuit similiter in Casu inter Brown and Shelton, de bonis Willi. Rawlins Clerici, which was committed to Sir Humphry Brown, who had married the Sister of Rawlins, and after came to W. Shelton and J. Shelton, the Sons of Sir Humphry's Lady by a former Husband, and reversed the first Administration, and obtained Administration to be granted to them. Quod nota, & in Casu supra, the said Duke had Issue Frances, by the French Queen, and after the Death of that Queen, he married Lord Willoughby's Daughter, and had Issue by her Henry, and died, and then Henry died, without either Wife, or Issue, and his Mother administered; and after the said Frances, Lady to the Marquis of Dorset, sued and reversed the Administration, and obtained Administration to be granted to herself; though she was but Sister of the half Blood to the said Henry; for that she is the next of Kin to the said Henry, he having no Children; for the Mother is not next of Kin to her own Son in respect to this Point, as the Law then stood; for it ought to descend, and not ascend by the Law of England, or by the Civil Law, and the Children are *de sanguine Patris & Matris, sed pater* &

See Text: 464.  
468.

Wins: p. 467.

†  
*See Law Test.*  
*p. 466. 485.*  
 & mater non sunt de sanguine puerorum; and by Isidore, Pater & Mater, & puer sunt una Caro; and therefore no Degree is between them, otherwise it is between Brother and Sister, and the half Blood is no Impediment as to Goods. Bro. Abr. Administrator. C. 47. and Vide Casum De Propinquioribus Heredibus de sanguine puerorum. 30 E. 3. Lib. Ass. p. 47. Fitz. Devise 14. plus de Administratibus, Title Administration in Fitzbert & in statut. Tit. Administrators.

6. In Canc. 1. May 1740. Havers and Havers.

\* The Case was, one Matthew Havers died, having first made his last Will and Testament, and thereby bequeathed to Anne his Wife, the Residue of his personal Estate making his said Wife his Executrix. Sometime after the Wife died, leaving behind her her Infant Daughter and only child of that Marriage; hereupon the Grandmother of the Infant, as her next of Kin, was appointed her Guardian, and the Surrogate granted Administration *durante minoritate* the Infant to the Grandmother, who was but in very necessitous Circumstances: Anne, the Infant, was intitled to a Personal Estate of 600*l.* Value, besides the Arrears of Rent of a real Estate. The Grandmother found Security, who entered into an Administration Bond in the Penalty of 200*l.* conditioned for duly Administering the Estate of her Intestate. Sometime after this Administration was compleated, she found Means to give a further Security of 600*l.* to the same Purpose, and sometime after

After this, she also took out Letters of Administration *de bonis non* of the Father; and having these several Administrations committed to her, she brought several Actions at Law, in order to get in what was owing to the Estate of the Father and Mother; whereupon a Bill was brought by the *Prochein* *Amey* of the Infant, and several of the Defendants in the Actions at Law, against the Grandmother, praying an Injunction to stay the Proceedings on those Actions, and that she might be compelled to bring into Court for safe Custody all Money of the Infant's, which she had got into her Hands. To this Bill was an Affidavit annexed of the Truth of the Allegation. The Defendant put in her Answer, and the Attorney General now moved for a Receiver of the Infant's Real and Personal Estate, and shewed Cause why the Injunction should not be dissolved. Lord Chancellor said, That he neither liked the Manner of the Bill, nor the Defence which had been made against it. 'Tis an odd thing for Debtors to make themselves Plaintiffs in a Cause under Pretence of taking Care of the Estate, and to pray an Injunction to stay the Proceedings in Actions commenced against themselves, nor did he like the Defence which had been made to this Bill, That a Woman, who was under necessitous Circumstances, should insist upon keeping the Possession of an Infant's Estate. She appears to be very poor, and on that Account, was very unfit to have been trusted by the Ecclesiastical Court with the Administration during the Minority of the Infant; it is therefore incumbent on this Court



to take Care of the Infant's Interest. It has been said, that the present Bill is not proper; because the Ecclesiastical Court has the sole Right of determining concerning the Fitness, to whom Administration is to be granted; but it by no Means follows from thence, that the Nature of the present Bill is not a proper one for this Court to relieve in; and where it sees Reason to think that there will be a Misapplication of the Effects of the Intestate, and an Abuse and Wasting, to the Prejudice of an Infant, by a limited Administrator who is only a Trustee for the Infant; it is incumbent on this Court to take Care that the Infant be not prejudiced; and in such Case, if they see the Exercise of a Jurisdiction by the Surrogate to the Infant's Prejudice, this Court will interfere. The Administration during the Minority of the Infant, in the present Case, his Lordship said, had been granted in the most careless, slovenly, and scandalous Manner that he ever saw; this is an Administration which the Grandmother had not any Right to, and that was a Circumstance, which his Lordship said he thought was of considerable Weight in the present Case; it was therefore incumbent upon the Surrogate to have taken Care, that this Administration should have been granted to a responsible Person; at the Time of granting this Administration Security is only taken in the Sum of 200*l.* and under this Administration, the Grandmother was in Hopes of possessing herself of the whole Estate of the Infant; and as to what is said of her being Administratrix *de bonis non* to the Father, and

*Chancery* —

and under that Pretence justifying the Actions she has brought, in order to get in the Estate of the Father, his Lordship said, the obtaining that Administration was only an After-thought, in order to substantiate the Proceedings in those Actions. The Infant is intitled to a Personal Estate of the Value of 600*l.* besides the Arrears of Rent of a Real Estate; and yet so little Care has been taken of her Interest, as to grant Administration, during her Minority, to an Alms-Woman, with the Security only of 200*l.* This Negligence of taking so small a Security has been endeavoured however to be supplied by taking of another Bond in a larger Sum; but by the taking of the first Bond, and the granting Administration upon it, the Surrogate had done his Office; and therefore his Lordship said, he did not see what Authority he had to take this second Security; for these Reasons his Lordship said, he would direct that a Receiver should be appointed, both of the Real and Personal Estate of the Infant; his Lordship said, he would direct further, that the Master should see what Securities were proper to be called in, and that the Receiver should put such Securities in Suit, and said, he would direct further, that the Receiver should carry on, in the Name of the Administratrix, the Suits which are already begun, and should commence any other Suits in her Name, indemnifying her, and that Costs should be taxed the Administratrix as far as she has proceeded in these Suits. However, his Lordship said, That the Cause for the continuance of the Injunction should be disallowed, and ordered accord-

\* accordingly. *Vide etiam* Case *Devals* and *Peacock* in *Canc.* 8. of the same Month with the present Case to like effect.

7. *Per Holt* Ch. J. In the Vacation Time one may resort to the Chancery, and upon a Suggestion, That the Spiritual Court has proceeded to grant Administration to a wrong Person, may have a Prohibition out of that Court returnable *B. R.* or *C. B.* *Peere Will.* 42. *Vide* 476.

### 3. Administrator.

1. *Who, and what, he is.*

1. **A**dministrator is he who hath the Goods of one dying Intestate committed to him by the Ordinary, and is accountable for the same; and for and against him Actions lie, as for and against an Executor; and he is liable to the Value of the Assets come to his Hands, but not further, unless in Case of false Plea, and Devastation. Administratrix is she, who hath such Goods committed to her as aforesaid.

*Scinb. p. 291.*

2. Letters *ad Colligendum Bona Defuncti ad Usus Episcopi* is not Administration. *Bro. Abr.* Administrator 49. So be to whom granted, no Administrator.

2. *General to.*

Granting Administration was Originally Temporal, and came to Church-Men by the Indulgence of Princes, &c. *1 Ven.* 307. *Dac.* &c.

3. *When*



3. *When the Goods of the Intestate are said to be in the Administrator.*

1. After the Ordinary hath granted Administration, the Goods are in the Administrator, and the Ordinary hath nothing more to do therewith. *Cro. Car. 29, 202. Jo. 228. Hob. 83, 191. Mo. 864.*

2. By the Statute 31 E. 3. Administrators have as absolute a Property as Executors; They shall recover Debts, shall bring Actions, of Debt, Covenant, Case, and all other Actions as Executors may; they shall Answer to Actions in the same Manner as Executors, and shall be charged by the Name of Administrator. 9 Co. 37, &c.

4. *He is not compellable in the Spiritual Court to distribute, or account.*

1. Tho' Granting Administration is in the Ecclesiastical Court, yet Distribution does more properly belong to Chancery. *Pre. Ch. 112. 1 Lev. 233.*

2. Distributions are, according to the Statute of Distributions of Intestates Estates, made in Chancery as well as in the Ecclesiastical Courts, 2 Rep. Chan. 373. and the same Rep. fo. 371, &c. See the Statute of Distributions explained.

3. Upon long and solemn Arguments and Hearing the Civilians at large, it was resolved that the Ecclesiastical Court could not oblige an Administrator to distribute, and  
I that

that Bonds or Obligations taken for such Purposes were void *per tout le Cur.* 1 *Lev.* 233.

4. *Wood* died Intestate, and the Ordinary committed Administration, &c. and took a Bond from the Administratrix to account, and to distribute, &c. the Brethren of the Intestate sued the Administratrix, being the Intestate's Widow, for an Account and Distribution, the Intestate dying without Issue. Prohibition granted. *Palin* 527. *Vide Hob.* 83.

5. This Bill is against an Administrator and others to have Distribution of the Intestate's Estate according to the late Statute of Distributions, which Statute the Defendant pleaded, and that by the Statute the Ordinary is made Judge, and is appointed to take Security; and therefore the Plaintiff ought to sue there. The Lord Chancellor over-ruled the Plea, and ordered the Defendants should answer. 2 *Ch. Ca.* 95. 2 *Ven.* 362.

6. By Lord Ch. Just. If the Spiritual Court, since the Statute of Distributions, shall attempt a Distribution contrary to the Rules of the Common Law, we will Prohibit them; for by the Statute, they are restrained to the Rules allowed amongst us 1 *P. Will.* 49.

7. The Spiritual Court cannot compel Distributions, because they cannot enforce the Execution of a Trust. 1 *P. Will.* 549.

## 3. In what Order he is to pay Debts.

1. If Executors, or Administrators, or the Ordinary, pay Simple-Contract Debts before Specialties, they are chargeable *de bonis propriis*. Bro. Ab. Administrator. Case 50, 51, 52. Nelson 336, 397. 1 Ch. Cas. 249. Gilb. 96, 97. +

2. Debts are to be paid before Legacies. Nelson 381. Pre. Ch. 521. 1 Ch. Cas. 248, 257, 275. Dr. and Stud. lib. 2. c. 10. +

3. In Equity all Debts are equal. Pre. Ch. 181, 190.

4. If a Man gives a Note on borrowing Money to make a Mortgage, it is to be accordingly preferred. Pre. Ch. 190.

5. Debts are not to be paid, pending Suit in Chancery. 2 Ch. Cas. 200, 201. Pre. Ch. 188, 189.

## 4. Distribution.

### 1. How to be made.

1. Must be according to the Rules of the Common Law.

1. **P**rohibition upon a Suit in the Spiritual Court to compel an Administrator to distribute, and on long and solemn Argument, and Hearing all the Civilians could say, it was determined the Ecclesiastical Court might not compel him to distribute; and further that the Bond taken for that



that Purpose, was void, *per tot Curiam.*  
1 *Lev.* 233.

2. By Lord Ch. Just. If the Spiritual Court, since the Statute *Ch. 2.* of Distribution, shall attempt a Distribution, contrary to the Rule of the Common Law, we will prohibit them; for by the Statute they are restrained to the Rules allowed amongst us.  
1 *P. Will.* 49.

### 5. Accounts.

#### 1. Fraud in passing.

#### 1. To be relieved in Equity.

**T**HE Widow in the Spiritual Court set up a Procurator for her Children, the Infants, and got her Accounts passed there, and each Child's Proportion ascertained, and Distribution decreed, and on giving new Security, got the old Security discharged; the Court, without Regard had to the Proceedings of the Spiritual Court, decreed an Account of the whole Estate. 2 *Vern.* 47.  
*See ante* 106. *Vide ante* Case *Havers* and *Havers*, and also where cognizable in Equity, &c.

#### 6. Where Matter of Administration is to be tried.

**D**odderidge Just. Courts Christian have Cognizance of a Legacy; and therefore may well try Fully administered *per Testes*, they have the Cognizance of the Legacy; and therefore of the Plea concerning  
*plein-*

pleinment Adm. 3 Bulst. 319. Pal. 416, 422. Lat. 67.

## 7. Appeals in.

### 1. Their Effects.

**P**ER Cur. In Cases of Administration where the Appeal is brought in 15 Days, it suspends the former Sentence. Hard. 216. Vide Appeals, and also the several Courts Appeals from, &c.

## IV. Matter of Tithes.

### 1. General.

**T**ITHES, a Lay Fee. Stat. 32 H. 8. Fitzb. N. Br. 49. 20 H. 6. 11. 22 H. 6. 23. Cro. Car. 201.

2. Fitzberbert in his *Natura Brevium* fo. 30. holdeth, that before Stat. 18 E. 3. c. 7. Right of Tithes were determinable in the Temporal Courts at the Election of the Party. 5 Co. De Ju. R. Eccl. 16. a.

3. Tithes are more collateral to Lands than any Warren which the Owner of the Land hath in the Land; for by Feoffment of the Land, without a Saving of the Warren, the Warren is extinct, as it is held 5 H. 6. 56. But if a Prior who hath a Parsonage impropriate infeoff one of Part of the Glebe, yet he shall have Tithes against his own Feoffment, as is held in 42 E. 3. 13. a. and it is like to a Leet, and

yet if the Lord of a Leet purchase Lands within it, his Leet is not suspended; but if he make a Feoffment of his Land, his Leet in it is extinct, as is holden 7 E. 2. *Tith. Avowry* 211. and 8 E. 2. *ibid.* 212. But he hath an Inheritance, by the Common Law, in the Leet, which is descendible, and which he might grant over to whom he pleased. 11 Co. 13. b. 14. a.

4. *In Cases of Tithes.* 4 *Inst.* 339.

### 2. *The Sorts.*

**T**ITHES are of three Sorts, Predial, Personal, and Mixt, Predial are such as come of the Ground only, as Corn, Hay, Fruits of Trees, &c. Personal are such as come by the Labour, and Industry of Man, as Buying and Selling, Gain of Merchandize, and Handicraft Labours, and such as work for Hire, as Carpenters, Mafons, &c. Mixt, as of Calves, Lambs, Pigs, &c. which increase, partly of the Ground they are fed upon, and partly of the Keeping, Diligence, and Industry of the Owner. *Vide Terms de l' Ley, sub Tith. Dismes.* 2 *Inst.* 649. 1 *Roll.* 653.

### 3. *What, how, and to whom due.*

1. **T**ITHE naturally is but the Tenth of the Revenue of the Ground, and not of Man's Labour, where it may be divided, as in Grass, tho' not in Corn *Hob.* 250. 2. *Tithes*



2. Tithe is an Ecclesiastical Inheritance, collateral to an Estate of Land, and of its own Nature due only to Ecclesiasticks by the Ecclesiastical Law. 11 Co. 13. b.

3. Tithes are due by the Law of God, *ex Debito*, into whose soever Hands the Land come, unless in the Hands of the Parson. Dy. 43. a. Q.

4. Before the Council of *Lateran* there were no Parishes, nor Parish Priests to claim Tithes (tho' it is true they are Things of common Right, and do of Right, belong to the Church) but a Man might give them to what Spiritual Person he pleased; yet he must give them to the Church. And now, since Parishes are erected, they are due to the Parson, so that what comes in Discharge of Tithes must be considered as a Plea in Bar against common Right; and if you will discharge a just Demand, you must shew the Court of your Discharge, &c. *Hob. 296. Popb. 156.*

## 4. What great and what small.

1. **B** *Ridgman, Minutæ Decimæ* do not include Tithes of Lands, but only of Gardens, and Hemp and Hops, &c. *Palm. 222.*

2. Saffron is small Tithes, for it is a Flower. 38 *Eliz.* The Dean of *Norwich* was Parson, and had great Tithes, and the Vicar had the small Tithes, and arable Lands were converted to Saffron Ground, and the Vicar had the Tithes. *Palm. 222.*

3. Tithe-Lambs and Wool included with in small Tithes. *Poph.* 144. *Palm.* 220. Saffron, small Tithes. *Palm.* 220. Garlick, Wool, Pot-herbs, *Ova*, *Lacticinia*, *Cassia* & *Agni*, Hemp, Flax, &c. are small Tithes; so that it is the Nature of the Thing, and not the Value, which makes Tithes great or small. *Palm.* 220. Wood is *Minuta Decima*. *Cro. Car.*

### 5. Who capable of.

1. **O**F common Right all Tithes are due to the Parson, and the Vicarage is derived out of the Parsonage, and no Tithes, *de Jure*, belong to the Vicar, but only upon Endowment or Prescription, which ought to be shewed *ex parte* the Vicar, and the Court may not intend it; for the Vicarage is a Diminution and impairing to the Parsonage, whereof the Court may not take Notice *sans* shewing. *Teln.* 86, 87.

2. A Layman could not, at Common Law, have an Inheritance in Tithes, and Tithes would not pass by such Words as would pass Temporal Possessions; and therefore *Mich.* 31 & 32 *Eliz.* in a Prohibition between *John Perkins* and *Thomas Hynde*, Parson of *Babington* in *Somersetshire*, the Case was, That the said Parson by Deed indentured leased his Glebe *cum proficuis* & *Commoditatibus eidem spectantibus* for ninety-five Years, rendring Rent *pro omnibus exactionibus* & *demandis quibuscunque dictæ Rectorie pro clauso prædicto spectant*; and the Question

tion was, if the Lessee should have the said Close discharged of Tithes, during the Time; and it was resolved *per totam Curiam*, That the Tithes did not pass by such general Words; and as they are Tithes not severed they are meerly, and but, Ecclesiastical, for Subtraction whereof there is no Remedy at Common Law. 11 Co. 14. a.

3. If a Parson purchase Lands within his Rectory, and lease the Rectory, the Lessee shall have Tithes of these Lands purchased; and with this agrees 30 H. 8. Dy. 43. Vide 32 H. 8. Bro. Tit. Dismes. 11 Co. 14. a.

## 6. Who, and how, discharged from.

1. **T**ithes before the Severance are meerly Ecclesiastical, and so collateral to the Estate of the Land, that no Unity may extinguish or suspend them; but notwithstanding any Unity, they remain *in Esse*, where the Words of the Act are to be considered, that as well the King, his Heirs and Successors, as all and every such Person and Persons, their Heirs and Assigns, which have, or hereafter shall have any Monasteries, Parsonages appropriate, &c. Meses, Lands, &c. discharged and acquitted of Payment of Tithes, as freely, and in as large and ample Manner, as the said late Abbots, Priors, &c. had held, &c. the same, at the Days of their Dissolution; and upon these Words, for as much as the Unity doth not discharge or suspend the Tithes, but that they were *in Esse* at the Time of the



Dissolution, and forasmuch as these Words, *discharged* and *acquitted*, imply actual Immunity and Freedom, and that the King and his Patentees should not have them discharged and acquitted, but *sub modo*, that is to say, in as large and ample Manner, &c. as the said late Abbots, &c. and the said Abbots might not hold the said Lands, in Case of Unity, discharged but charged with the Payment of Tithes; therefore on the Question, whether the said Act should extend to the Case of perpetual Unity, and upon great Consideration it was resolved and adjudged, that perpetual Unity, Time whereof, &c. till the Dissolution shall be *prima facie* a Discharge of the Land from the Payment of Tithes, by Force of the said Branch of 31 H. 8. 11 Co. 14. b.

2. Unity within the Act 31 H. 8. ought to have four Qualities. 1st, *Talis Unitas*, that is, it ought to be just, rightful, and not tortious. 2dly, It ought to be *æqualis*, *sc.* Fee in one or other; for if that Abbots, Priors, &c. have held by Lease, Time whereof, &c. it is no Unity within the Statute. 3dly, It ought to be perpetual, Time whereof, &c. 4thly, It ought to be *libera*, free from the Payment of any Tithes; for if their Farmers at Will, for Years, &c. have paid any Tithes to them, the perpetual Unity will not serve. 11 Co. 14.

3. It was resolved that a general Allegation of Unity at the Time of the Dissolution, &c. *sans Averment*, that it was perpetual, was not good. 11 Co. 14. b.

4. If the Abbey, or Priory, was founded within Time of Memory, then he might not prescribe

prescribe to be discharged of Tithes *omnino*.  
11 Co. 15. a.

5. Of common Right all Lands ought to pay Tithes. 11 Co. 15. a.

6. If the Parson of a Church purchase a Manor within his Parish, now by this Purchase and Unity of Possession, the Manor which was tithable before is now become *Non decimabilis*, for as much as he cannot pay Tithes to himself; but if the Parson make a Lease of his Parsonage and Rectory to a Stranger, now the Parson himself shall pay Tithes *de son Manor* to the Lessee of the Rectory; and if the Parson make a Feoffment of the Manor, the Feoffee shall pay Tithes to the Feoffor Parson; so that Tithes may not be extinct by any Unity of Possession. *Dy. 43. a.*

7. Many Things are by our Law privileged from Tithes, which by the Common Law are tithable, as Timber, Oar, Coals, &c. without a special Custom subjecting them thereunto. *Ha. Hist. Law 32.*

## 7. Modus.

1. *What a good one.*

1. **P**eter Baker, Vicar of *S. P.* libelled in the Spiritual Court for Tithe Lambs against *Coaker*, and laid that Custom was, that all Lambs engendred, fallen and bred upon any one Tenement or Living in that Parish, tho' they belonged to several Owners, had been reckoned together, as tho' but one Man's, and the Tenths, or Tithe-Lambs

Lambs of them, so counted together, have been paid for Tithes; whereupon *Hender* prayed a Prohibition; for that all Customs against common Right are triable at Law, which was granted; and the Court was further of Opinion that the pretended Custom was unreasonable and against Law; for by this Means it might fall out that some one might have but one Lamb, and that might be taken for Tithe, and he who had more shall pay nothing at all. *Hob. 329.*

- \* 2. See Case *Mason and Mapleton in Banco Regis, Mich. 8 Geo. 2.* Under Division of what not to be paid, Of Agistment.

### 2. Whether destroyed.

#### 1. By Variation.

- \* Tho' the *Modus* had been varied by subsequent Composition for sixty-six Years, and had been once paid in Kind, yet that did not destroy it. *Clifton con. Orchard in Cons. after Mich. Term 10 Geo. 2.* Vide where to be tried Case 1.

### 3. How to be pleaded.

- \* *Hill. 4 Geo. 2. in Banco Regis. Stephenson and Hale.*

This was on a Rule to shew Cause why a Prohibition should not go to the Spiritual Court in a Suit there for Tithes. Mr. *Fazakerly* said, the Defendant below had pleaded a *Modus*; but then he had by another



other Part of his Plea destroyed the Whole of it, by Pleading further, that the Lands were in the Hands of the Monastery of and so were discharged; and he said it had never been determined, but that where the Plea of a *Modus* had been mispleaded, the Ecclesiastical Court might reject the Plea; and the Court declared that, according to the Common Law, such Pleas were not allowed; but said, they did not see why they should not, in the Spiritual Courts, as they thought they would in Chancery, and the Exchequer; and therefore there was no Reason to intend that this Plea was rejected there, for Want of Form; and accordingly the Rule was made absolute. See the Case, *Sbarpe and Lowther. Term. Trin.* 10. of his present Majesty.

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## 4. *Where to be tried.*

1. A Prohibition for Tithes against the Defendant, being a Farmer of a Rectory in *Essex*, on Surmise, that from Time whereof, &c. he hath used to pay four Shillings *per Annum* in Discharge of all Tithes, and his Proof was, that he used to pay four Shillings and six Pence *per Ann.* and on this Variance a Consultation was prayed; and because it appeared there were not any Tithes due in Kind to the Parson, as he hath sued, but it is a *Modus decimandi*, tho' not in such Manner as the Plaintiff surmiseth, the Court would not grant Consultation; for that he had not any Cause to sue for Tithes of that Land; and so ruled. *Cro. Eliz.* 819.

2. If

2. If a Prohibition be granted upon Suggestion, and the Parties go to Issue upon this Suggestion, and it is found against the Plaintiff in the Prohibition; yet if it appears to the Court, upon the finding of the Jury, that there is a good Discharge of Tithes upon a *Modus decimandi*, tho' the Plaintiff hath mistaken his Issue, no Consultation shall be granted; for that it appears that they had not Jurisdiction of it in the Spiritual Court. *Hob. Berrie's Case. Ro. Abr. Prohibition, fo. 320. Case 1.*

3. If Issue be joined in Prohibition, whether all the Lands ought to be discharged of Tithes, by a certain *Modus decimandi*, and the Jury find that all the Lands, *præter* certain Acres, ought to be discharged, &c. but not those Acres; tho' the Issue be found against the Plaintiff in the Prohibition, yet no Consultation shall be granted for any of the Lands, but for these Acres; forasmuch as it appears that there is a real Discharge, and good Composition for it. *Mich. 15 Jac. Perry con. Bawtrey. Hob. Ro. Abr. Prohibition, fo. 320. Case 2. Vide Case 3.*

4. If there be a Suit in the Ecclesiastical Court concerning the Manner of Tithing, *sc.* for a Custom for the Owner to have fifty-four Sheaves of Corn, and the Parson five as Tithes, if this Custom be denied, a Prohibition lies; for they are not to try the *Modus*; because it is to charge the Inheritance. *Hob. fo. 247. Scot con. Wall. Prohibition granted. Ro. Abr. Prohibition, fo. 307. Case 20.*

5. They may not try a Custom in the Ecclesiastical Court by which the Inheritance

ance is to be perpetually charged, and yet it is but, in Effect, a Denial of the Prescription. *Ro. Abr. Prohibition, fo. 308.*

*Case 20.*

6. If where a Prescription is general for all the Inhabitants and a Prohibition is granted for one who is sued, if the Parson sue another upon the same Title, the first not being determined, an Attachment lies *Mo. fo. 599.*

7. *Hill. 9 Geo. 2. Banco Regis. Anonymus.* \*

On Rule to shew Cause why a Prohibition should not be granted to the Ecclesiastical Court, Mr. *Filmer* observed this was a Suit for Tithes of the Agistment of unprofitable Cattle, brought by the Vicar, whereto the Defendant had pleaded a *Modus* for to pay fifteen Shillings to the Impropiator in Lieu of all Tithes from those Lands, and he submitted it, that this Matter the Ecclesiastical Court might well proceed in to try, and cited to the Purpose *Taylor* and *Draken's* Case, *Pas. 4 Geo. 1.* which was a Suit by a Vicar against the Lessee of the Rector for Tithes of Turnips; the Defendant pleaded they belonged to the Rector, and not to the Plaintiff, as Vicar; whereupon was a Rule to shew Cause why a Prohibition should not go; but on Argument the Rule was discharged; he also cited 2 *Ro. Abr. 313.* 2 *Bulstr. 157.* Mr. *Denison*, on the other Side, denied the Case in *Bulst.* to be Law, and insisted, that as this was a Plea of a *Modus*, the Ecclesiastical Court had no Jurisdiction, and the Court being of the same Opinion, the Rule was made absolute. *Vide post,*



post, what a good Evidence of a Custom or Prescription.

8. Of what Tithes not to be paid.

5. What good Evidence of.

Vide ante, where Custom or Prescription comes in Question, what good Evidence of.

1. **A** Man shall pay Tithes but once for the Produce of the same Land in the same Year. *Telv.* 86, 87. *Vide Hob.* 250, 296. *Pop.* 156. *Palm.* 219.

2. Lands are not tithable by Law, that is, Things of the Substance of the Earth and not Annual, as Quarries of Stone, Turf, &c. No Tithe of Timber-Trees, because they are of Parcel of the Inheritance, nor of Lops, Tops, nor Bark, &c. 2 *E.* 6. No Tithe to be paid of Coals or Quarries, &c. *Fitzb. N. Br.* 53 G.

3. If one be sued in the Spiritual Court for Tithes of seasonable Wood, the Party aggrieved may suggest, either in Chancery, or in *B. R.* that he is sued in *Curia Spiritualis* for Tithes of gross Trees, which are past the Age of twenty Years by the Name of *Silva Cadua*, &c. and pray a Prohibition, and have it. *Lit. Bro.* 37. *Case* 193.

4. Suits were in Court Christian for Tithes of Cherry-Trees, and Aspe and Beech-Trees in *Buckinghamshire*, but a Prohibition was granted; for in this Country Timber is so scarce, that these Kinds of Woods served for

or Timber, and Aspe serves for Arrows; which are for the Defence of the Realm.

*Ro. Rep.* 83, 355.

5. No Tithes due of Slate or Stone; for e hath it of the Grass or Corn, which grows on the Surface. *Cro. Eliz.* 277, 8.

6. Tithes not due of Things which come of the Labour of a Man, but of Things enovant, &c. *Cro. Ja.* 524.

7. Tithes shall not be paid for Cattle fed to be eat in the Family, neither of Cattle reared for the Pale, or the Plough. *Cro. Ca.*

37. Tithes not payable for Fish, unless by Custom. *Cro. Ca.* 339, 264. Tithes not to be paid of Mines of Coals, or Stone, nor of Wood spent in Hedging or Fuel in the House where, &c. *Cro. Car.* 526.

8. In Prohibition the Plaintiff prescribed, that all Tenants and Occupiers of the Meadow had used to cut the Grass and to strew it abroad, called Tedding, and then to gather it into Winrowes, and then to put it into Grass-Cocks in equal Parts, without Fraud; and then to set out every tenth Cock, great or small, to the Parson, in full Satisfaction as well of the first as the latter Making; upon Traverse of the Custom it was found for the Plaintiff, and Exception was that the Custom was void, because it contained no more than every Owner ought to do, and so no Recompence for the second Making; but the Court gave Judgment for the Plaintiff; for Tithe naturally is but the Tenth of the Revenue of my Ground, not of my Labour and Industry, where it may be divided, as in Grass it may, tho' not in Corn; and in diverse Places they left out the

the Tenth Acre of Wood standing, and so of Grass, and so here the Jury having found this Form of Tithing to be the Custom there, it is well. *Hob. 250.*

9. For Tithes of After-mowth, that there is a Custom, in Consideration that he should make the first Tonsure in good and sufficient Hay, and set it out in Cocks sufficiently dried and ready to carry away, that he should be discharged from the Tithes of the After-mowths; and that was held a good Suggestion; because of the Expence he was at in making it perfect Hay. And upon a Surmise that he was sued for Tithe of Bees, in Consideration that he paid it of Honey and Wax, and was at the Charge of Maintenance of them in the Winter, he was discharged of the Tithes of the Bees. *Cro. Ca. 404.*

10. *Austen*, Vicar of *A.* in *Essex*, libelled in Court Christian against *Green* for Tithes of Herbage and Agistment of Cattle upon the Grounds there, after Harvest, and lays the Custom there, *quod quælibet Persona habens & possidens aliquod Pratum sive Fundum in aliquo uno Anno infra Paroch. præd. unde Fœnum eodem Anno nactum fuit sive provent. a tempore cujus, &c. usus fuit & consuevit ap- tis temporibus anni illius gramen super hujus- modi Pratis sive Fund. crescens, ad expensas suas proprias, metere & defalcare, & gramen sic messum postea ad similia Castagia, &c. in Cumulos, vocat. Cocks, congerere, & quemlibet decimum Cumulum sic inde congest. a cæteris novem Cumulis, &c. ad usum Rectoris Eccle- siæ Parochial. prædict. sive ejus Firmar', &c. dividere & exponere, in plenam & integram content.*



content. solutionem, satisfactionem & exonerationem, ac nomine & loco omnium & singularum Decimarum quarumcunque de, in, vel super, aliquibus hujusmodi pratis sive Fundis, unde Fœnum in hujusmodi Anno nactum fuit, eodem Anno surgens, renovans, &c. quem quidem decimum Cumulum, &c. in forma, &c. congeſt', &c. omnes & ſinguli Rectores, &c. in plenam & integram content', &c. ac nomine & loco, &c. acceptaverunt, &c. and alledges in Fact Performance of the Custom that very Year, in which the Vicar libelled, &c. Upon this the Defandant the Vicar demurred, and Judgment was for the Plaintiff, and two Points were resolved; First, that a Payment of Tithes to the Parſon is a good and ſufficient Discharge againſt the Vicar; becauſe of common Right all Tithes are Due to the Parſon, and the Vicarage is derived out of the Parſonage; ſo that no Tithes, *de Jure*, belong to the Vicar, but only upon Endowment, or Preſcription, which ought to be ſhewed *ex parte* the Vicar, and the Court might not intend it; for the Vicarage is a Diminution and Impairing to the Parſonage, whereof the Court may not take Notice *ſans* the ſhewing of the Party. 2. That the Custom *ſupra* is good; for as the Owner of the Ground pays Tithes of Hay; he is therefore diſcharged, of Common Right, from Tithes for Agiſtment of the ſame Lands in the ſame Year; becauſe the ſame Land ſhall answer but one Tithe for one Year; and the Agiſtment is nothing but the Profit by the Beaſts feeding there upon the ſame Land, whereof the Parſon before had Tithes of Hay. And Juſtice Tanfield ſaid,

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That it was adjudged in *Edolph's Case* in *Com. Oxon* that paying Tithes of Rye or Wheat in the Sheaf, he need not after pay Tithes of the Straw of the same Land; for this Straw is nothing but Part of the Stalk, upon which the Tithe Sheaf grew according to *Fitzh. Nat. Brev. 53. G. Telverton pro Quer. Tel. 86, 87.*

\* 11. Tithes for Malt-Mills are only Personal; for it is not natural Increase, being only a Profit arising from an Invention of a Machine, and the Labour of a Man and Horse, and if only Personal, can only be for the Tithes of the neat Profits, deducting all Charges, and Personal Tithes can only be due by Customs, and not of Common Right. *Vide Case Chamberlain and Plimpton* in the House of Lords, 20 Jan. 1706.

\* 12. Of Milch Cows no Tithes for Depasturage. *Mich. 10 Geo. 2. in Canc. Clifton and Orchard.*

\* 13. *Mich. 7 Geo. 2. in Banco Regis, Donalt and Lowther.*

The Defendant had libelled in the Spiritual Court for the Tithe of a Corn-Mill, as Predial Tithes; the Plaintiff set forth in his Answer, that he conceived the Tithe of a Corn-Mill to be Personal Tithe, and therefore prayed to be allowed all his necessary Charges in attending the Mill before the Tithes should be paid; and the Spiritual Judge thought fit to over-rule this Plea and Sentenced the Plaintiff to pay Tithes *sans* Deduction; whereupon Mr. *Denison* moved for a Prohibition, and cited the Case of *Chamberlaine and Plimpton* determined in the House

House of Lords 20 June Anno 1706, wherein he said it was resolved, that the Tithe of a Corn-Mill was Personal Tithe; accordingly Rule was to shew the Cause.

14. Mich. 8 Geo. 2. Banco Regis. Mason and Mapleton. \*

This was upon a Rule to shew Cause why a Prohibition should not be directed to the Ecclesiastical Court. Mr. Wynne now Serjeant said, that the Suit below was for Tithes of the Agistment of Pasture Lands, and on Lands which had been mowed, and the Sentence of the Judge below was, that the Defendant should pay the Plaintiff Seven Pounds on this Account; he said, he did agree that the Lands which had been mowed were possibly not subject to pay Tithes for the Agistment; but he submitted it, that it did not necessarily appear that the Sentence of the Judge below was for the Tithes of the Agistment of these Lands, but it might be for the other; at least he submitted it, that the Prohibition should only go as to the Tithes of the Agistment of the mowed Lands. My Lord Ch. Just. said, that it could not be intended but that the Sentence was for the Agistment, as well of the one as the other, and that in this Case the Sentence was intire; for which Reason the Rule was made absolute, that the Prohibition should go generally. Mr. Wilbrham came Term. Paschæ following, and moved in Arrest of Judgment; he said this was a Declaration in Prohibition, wherein two *Modus*'s were set out in Discharge of Tithes, each of which he conceived was void. The first *Modus* was to be discharged of all Tithes of Grass in



the Land in Question, in Consideration of making the Grass into Cocks; but that he conceived was no more than the Occupier of the Land is bound to do; he said, it has been doubted whether the Occupier is not bound even to make the Grass into Hay; but that he agreed the Law did not require; but to make the Grass into Cocks has always been understood the Occupier is bound to do; and if this were so, then the doing of it could not be in Discharge of all Tithes of Grass of this Land; for it is known that there is an After-mowth and a Tithe due of that, tho' of the after Pasture a Tithe is not due, for which Purpose he cited *R. Abr.* 640. 2 *Inst.* 652 *Telv.* 86. *Mo.* 910. *Hob.* 250. *R. Abr.* 644. The 2d *Modus* was to pay a Penny for every Cow, in Lieu of the Agistment of all Cows, and to pay a Halfpenny for every Calf, in Lieu of the Agistment of all Calves; but he said, he conceived this *Modus* likewise void; for from Milch Cows no Tithes of Agistment is due, neither from the Agistment of Calves the first Year, and accordingly Judgment was ordered to stay till the Court should be further moved; and now Mr. *Ager* came and moved for Judgment, and with Regard to the first *Modus*, he submitted it to be clearly good, he said it was, that in Consideration that he, and all those whose Estate he had, had Time out of Mind at their own Costs and Charges mowed the Grass, made it into Grass-Cocks, and set out the Tenth Grass-Cock for the Parson, they had Time out of Mind been discharged from all Tithes of Agistment due from the Land the Year it was

was so mown. This, he submitted, was doing more than by Law the Occupier was bound to do; and therefore was a good *Modus*; and for this Purpose he relied upon *Hob. 230.* cited on the other Side. *Telv. 86. 2 Cro. 116. 2 Lutw. 1071.* Besides he said the Conclusion of setting forth the *Modus* was, which said Tenth Cock of Hay the Parson has accepted; but that he thought there was no Occasion to rely upon. With Regard to the second *Modus*, he submitted it, that was good also; and he conceived that as the *Modus* is only pleaded to be in Discharge of the Agistment of Cattle, the Construction of that Part of it which alleges the Penny to be paid for every Cow, and a Halfpenny for every Calf, must be, that this Money was to be paid only for such Cows and Calves as were agistable Cattle; for which Purpose he cited *2 Salk. 662.* But even supposing these *Modus's* not to be good, yet still he said the Plaintiff could not have a Consultation; for he has libelled for nothing else save the Tithes for the Agistment of Cattle after the Grass is mown, and of such Agistment no Tithes are due. The Court was of Opinion that these *Modus's* were both good, and if they were not, that yet the Plaintiff could not have a Consultation for Reasons mentioned by Mr. Ager; and Judgment was given accordingly.

9. *Who may have any, and what Remedy against a Demand of Tithes.*

**I**F Lessee for Years be sued in Court Christian for Tithes, he in Reversion may have a Prohibition. *Cro. Eliz. 55.*

### 10. *Suits.*

#### 1. *General.*

1. **I**F a Parson sue for not setting out of Tithes, according to the Statute 2 E. 6. and the Defendant says he set them out, which Plea is refused, because it is not a sufficient setting out, if the Parson be not present; yet a Prohibition shall be granted; for that it is sufficient by the Common Law, tho' the Parson be not present. *Mich. 15 Jac. R. Abr. Prohibition 302. Case 19. 3 Mod. 286. Vide where the Ecclesiastical Courts refuse such Plea as would be good in the Temporal Courts, per tout.*

2. If a Right of Tithes comes in Question, the Spiritual Court has Jurisdiction, if a Discharge, the Common Law has. *Mod. 42. Cardinal Poole's Case, Cro. Car. 395. Hard. 480, 481.*

3. A Vicar libelled against the Parson for Tithes of the Glebe; the Parson brought a Prohibition, and it was adjudged maintainable. *Mod. 457.*

\* 4. Suit was by the Vicar for Tithes of the Glebe Lands against the Lessee of the impropriate



appropriate Rector; the Defendant pleaded that Tithes were never paid of these Lands to the Vicar or his Predecessors; to shew which Plea sufficient were cited. *Lutw.* 1062. 3 *Cro.* 479, 578. 2 *Ro. Abr.* 335. My Lord Ch. Just. agreed that if this Demand had been by the Rector, the Plea had been good, (*as Tithes are, as I conceive, due to every Rector of common Right*) but as it was by the Vicar, who can only claim by Endowment, or by Prescription, his Lordship was of Opinion it was not good. *Barecroft and Price, Trin. 8 Geo. 2. B. R.*

5. If a Prohibition be granted upon a Discharge of Tithes *sur le Stat.* 31 *H. 8.* in the Hands of an Abbot, and it be tried at Law, and the Plaintiff nonsuited, and a Consultation granted, and the Plaintiff in the Prohibition pleads the same plea in Discharge of the Payment of Tithes, which was alledged in the Prohibition, which the Ecclesiastical Judge accepts and proceeds to Trial, a Prohibition lies; for the Trial at Law is final upon this Libel, and it shall not be tried in the Ecclesiastical Court again, it being proper for (*and having receiv'd*) a Trial at Law. *R. Abr. Prohibition, fo. 319. O.*

6. By Lord Chancellor, when a Suit for Tithes is instituted below, the Party has his Election to apply for a Prohibition, or file a Bill of this Sort; and his Lordship further said, if the Party had applied for a Prohibition, it had gone in Course, in Order to have tried the *Modus*; and he thought it reasonable in the present Case to direct an Issue to try the three *Modus's* in the Principal Case.

Case. Clifton and Orchard, after Mich.  
Term 10 Geo. 2. in Chancery.

2. *Where to be tried.*

1. *General.*

1. If the Farmer of the King sue in the Exchequer against a Parson for retaining of Tithes, Parcel of the Possession leased to him by the Crown; tho' the Right of Tithes come in Debate between them, yet the Court shall not be ousted of its Jurisdiction. *Ro. Abr. Prohibition, C.*

2. In Trespass if the Right of Tithes come in Debate between a Parson and a Layman, the Court shall not be ousted of its Jurisdiction. 29 E. 3. 39. b. *Ro. Abr. Prohibition, B. 2.*

3. In Trespass if the Right of Tithes come in Question between a Parson and a Layman, being Farmer of another Parson, the Court shall not be ousted of Jurisdiction. 20 H. 6. 17. b. *Ro. Abr. Prohibition, D. Case 1.*

4. If one, not a Parson, bring Trespass *de son blees* taken against another, who claims as Tithes being a Parson, the Court shall not be ousted of Jurisdiction, because they are not two Parsons; and therefore the Plea is but a Traverse of the Writ, *scil.* that it is not the Plaintiff's Corn. 38. E. 3. b. *Ro. Abr. Prohibition, X. 3.*

5. If a Prior bring Trespass against an Abbot *de ses blees emports*, if the Defendant say that the Plaintiff is Parson, and that the  
Lands

Lands of the Defendant ought to be free of Tithes, by Composition, and that the Action is brought for Tithes, there the Court shall not be ousted of Jurisdiction, because that the Plaintiff hath not supposed himself Parson, nor that the Action is brought for Tithes. 38 E. 3. 8. Ro. *Abr. Prohibition*, X. 4.

6. A Bill in *Canc.* to establish a *Modus* was dismiss'd as Matter proper for Common Law. 1 Rep. Chan. 25, 27. *Note the Time, such Bills being frequent both before and since. I think this Dismission was when Bishop Williams was Chancellor.*

7. Prohibition was granted upon a Discharge of Tithes *sur le Stat.* 31 H. 8. in the Hands of an Abbot, and on Trial at Law, the Plaintiff was nonsuited, and a Consultation was awarded, and the Plaintiff in this Court pleads the same Plea in Discharge of the Payment of Tithes, which was alledged in the Prohibition, which Plea the Spiritual Judge accepts and proceeds to Trial, there a Prohibition lies; for the Trial at Law is final upon this Libel, and it shall not be tried in the Ecclesiastical Court again; it being proper for a Trial at Law, and had been there tried and properly belonged to the Judges at Law. *Hob.* 286.

## 2. Where Composition.

1. In Trespass against a Prior of his Corn taken; the Defendant says, that he is Parson, &c. and these were severed for Tithes from the nine Parts and so he took them; if



if the Plaintiff plead an ancient Privilege to be quit of Tithes, and a Composition made between the Plaintiff and the Defendant, rendering a certain Sum to the Defendant yearly; yet the Court shall not be ousted of their Jurisdiction; for that the Right of Tithes came in Question. 38 E. 3. 6. b. Ro. Abr. Prohibition, X. Case 5.

2. In Trespass against a Parson, the Defendant justifies, as of Tithes severed from the nine Parts, and the Plaintiff pleads the Grant of the Defendant of the Tithes of these Lands for one or two Years, the Court shall not be ousted of Jurisdiction. 38 E. 3. 6. b. Ro. Abr. Prohibition, X. Case 6.

3. *Lapthorne* sued for Tithe Wood in the Spiritual Court of *Gloucester*, and *Bridgeman* moved for a Prohibition, for that the Suit was for Beech, which are of great Age, *scilicet*, 80 Years of Age, at least, and also the Parson hath had a Consultation for Tithe Wood, *viz.* certain Wood in the Woods of the Lord for Time immemorial, and never had Tithe Wood; *Ergo Cooke*, Buck is a Beech, and the County of *Buckingham* hath its Name from the Beeches there, and this is good Timber in that Country; and therefore it was adjudged in *Sir Edward Carey's* Case, that Waste lies for Beech in this Country, and in the Parish where I live Tithe Wood has never been paid; but the Parson hath Wood that is called Tithe Wood, and he pays for it four Pence a Year to the Lord of whom held; and therefore it shall be intended, that it was given for a Composition for all Tithe Wood within the Parish; in as much as no Tithe hath ever been

been paid for Wood ; and a Prohibition was granted. 1 Ro. Rep. 355.

4. *Pringe*, Vicar of *Easton* in *Com. Oxon.* libelled in Court Christian for small Tithes upon Composition between him and the Parson appropriate against *Childe*, who pleaded the Prescription against the Composition. *Pringe* had a Prohibition in the King's Bench against his own Suit in the Ecclesiastical Court, and upon many Arguments the Prohibition stood, *hoc Term. Pas. 4to Jacobi Reg.* And also it was decreed in Chancery for *Pringe*, that the Prescription was not lawful against the Composition, and an Injunction was awarded for the Vicar to stay the Suit of the Parson for the Tithes limited to the Vicar upon the Composition. *Mo. 780, 781. Vide 5 Co. de Ju. Reg. Eccl. 9 a. Ha. Hist. Law. 3 Mo. 907, 908, &c.*

5. It shall be tried *per Pais*, if the Suit in Court Spiritual be for Tithes or for Debt upon it, &c. which is a Lay Chattel, and not by the Rolls of Ecclesiastical Court, so their Proceedings are not of Record. *Bro. Abr. Trials 12.*

6. Prohibition on Issue, whether for Tithes or Debt reserved thereupon which is a Lay Chattel, it is to be tryed *per Pais*, and not by the Rolls of the Commissary, & sic *Vide* that they are not of Record. *Bro. Abr. Tit. Visne 17.*

7. *Small* sued for Tithes, and the Plaintiff suggested an Accord and Agreement, he being a Parishoner, for 40 Shillings a Year to retain his own Tithes, and did not prove it within six Months: *Et per Cur.* he need not; for such Proof goes only to a *Modus Decimandi*,

*mandi*, and not to other Suggestion on Lease or Contract, and so it is in the King's Bench. *Telv.* 102.

8. Where a Man grants Parcel of his Manor to another to be quit of Tithes by Deed, and the Parson with the Assent of the Ordinary grants he shall be quit for that Parish, if he or his Assignee be after impleaded in the Spiritual Court for Tithes, they may have a Prohibition on the Deed; and if the Deed were before Memory, and so had continued to be quit of Tithes, he should have a Prohibition on the Matter shewed. *Fitz. N. B.* 41. G.

9. Prohibition for Tithes. *Fitz. N. B.* 40. N. (See there the Form of the Writ.) 41 H.

10. Prohibition by the Plaintiff in the Spiritual Court to stay his own Suit; for that he suing for Tithes in the County of *Norwich*, by Virtue of a Lease made by the Vicar of *Tostes* for three Years, the Defendant claimed to be discharged of the Tithes by a former Lease and Composition by Deed; and the Court held, that the Plaintiff himself might have a Prohibition to stay the Suit; for they are not to meddle with the Trial of Leases or real Contracts, tho' they have Jurisdiction of the original Cause, (*viz.* Tithes) for the Lease is in the Reality, and it is not merely incidental. *Et non refert*, although the Plaintiff in the Spiritual Court brings this Prohibition to stay his own Suit; for if this Court hath Knowledge by any Means that the Spiritual Court meddeth with Temporal Trials, they ought to grant a Prohibition. *Cro. Ja. fo.* 350, 351. *Vide*



Vide 1 R. 3. 4. 2 Show. 406. See hereafter  
Parish Clerks, Jervis and Austin's Case,  
B. R.

## 3. Where Bounds of Parishes, &c. come in Question.

1. If the Issue be, whether the Place where the Tithes are be within the Parish of one Parson or another, the Court shall not be ousted of its Jurisdiction. 50 E. 3. 20. 20 H. 6. 17. b. 22 E. 4. 22. 38 E. 3. 5. b. 39 E. 3. 23. b. Rol. Abr. Prohibition, E. 1.

2. The Bounds of a Parish, whether Tithes grew in one Parish or another, were tried per Pais. Bro. Abr. Trial, 16.

3. A Parson sues for Tithes in the Spiritual Court, and the Defendant says, that the Place where is in another Parish, a Prohibition lies. Rol. Abr. Prohibition, E. 3.

4. If in a Parish there be a Chapel of Ease, and a Vicar of it distinct from the Parish-Church, and the Vicar is indowed of Tithes of Parishioners who are inhabitant within the Chapelry, and the Vicar sue one of the Parishioners not within the Chapelry, and he says he is of the Parish, and not of the Chapelry, a Prohibition shall be granted; for now the Bounds of the Chapel come in Question. Hill. 15 Ja. B. R. enter le Vicar del Chapel de Boston in Cornubia & un auter de Parish de ———, Rol. Abr. Tit. Prohibition, 291. L. 4.

4. *Where severed from the nine Parts.*

1. Trespafs lieth against him who carries away Tithes severed from the nine Parts; *aliter* where he will not sever his Tithes, but carries them all away; in such Case there lies a Suit in the Spiritual Court. *Bro. Abr. Trespafs*, 108.

2. If one be put out of his Tithes by a Severance of nine Parts from the ten, and after carries away the Ten, the Parson may not sue in Court Christian; for that by the Severance it was become a Chattel, for which he might have Trespafs. *Rol. Abr. Prohibition*, fo. 41. *Cro. Eliz.* fo. 607. *Leigh and Wood's Case*, and also *Blackwell's Case*, *Cro. Eliz.* 843, 844.

3. At Common Law Notice to the Parson, in Case of Tithes, of a Severance from the nine Parts is not necessary; though by the Ecclesiastical it is. 3 *Mod.* 268. *Rol. Abr.* 300. Case 9.

5. *Where the Validity of a Deed comes in Question.*

1. If a Man sue for Tithes *versus* *J. S.* in the Ecclesiastical Court and make Title by a Lease from the Parson to him made thereof, and *J. S.* also makes Title to them by Force of a former Lease made to him by the same Parson, so that the Question there is, which of those Leases shall be preferred; a Prohibition shall be granted; for they may not try which of the said Leases shall

shall be preferred, though they had Cognizance of the original Suit; for the Leases are Temporal. *Mich. 12 Ja. Wrots and Clifton, Rol. Abr. Prohibition, U. Case 4.*

## 6. Where the Suit is improper, how the Party to be punished.

1. By all the Judges, if a Parson libel for Tithes, and a Prohibition is brought, and the libel for Tithes of another Year, the first not being determined, an Attachment shall be awarded. *Mo. 599.*

2. If a Man lease his Vicarage for Life or Years, rendring Rent, and sue in *Curia Ecclesiastica* for the Rents, a *Præmunire* lies; for the Rent is a Lay Fee. *Bro. Abr. Præmunire, 5.*

3. 17 H. 7. *Spelman* reporteth, that one *Turbervile*, as well for the King as himself, sued a *Præmunire* against a Parson for suing for Tithes in the Ecclesiastical Court, alledging the same to be severed from the nine Parts; and Judgment was given against the Defendant. 3 *Inst. 121.* So that, as I apprehend the Matter, the *Præmunire* is incurred by suing in the Ecclesiastical Court for a Matter notoriously remedial at Law, this being a Drawing the Matter ad aliud examen.



## V. Charities.

## The Introduction, or Author's Apology.

**I** had not, save for the following Causes, here introduced any Thing of Charities and other Exemptions from Ordinary Jurisdiction, notwithstanding their Relation to my present Purpose, and that principally for two Reasons, namely, first; For that I hold the particular Learning on these Heads deservedly challenge a separate and distinct Treatise and Consideration. Secondly; For that I have now got by me ready prepared, and disposed, the Materials necessary to such a Work, which I find, to take no more than what is essentially necessary to the thorough Understanding of that Doctrine, would swell the present Work to too great a Bulk; therefore I shall satisfy myself, at the present, with such general Notions on these Heads as may serve the Lay Founder, Donator and Impropiator, &c. to prevent Ecclesiastical Incroachments on their Temporal Properties, and to right themselves where these Abuses have already began. But I am aware, if I have, as I confess I have, an Intention of publishing a particular Treatise on these several Heads, this Question will be objected to me, wherefore do I at all meddle with them now? To this I have given sufficient Answer already, namely, to prevent and correct such Abuses as have or may be offered to the Property of Lay Founders, Donators, &c. in the mean Time.

But to those, to whom such Reasons may not be conclusive, I further Answer, that I had this further Reason inducing me to meddle with these Matters at this Time, and in this Place, (to wit) that as I have, from my own Experience, of which in these Matters I have not had the least of all Men, as well as from the Observation of others, discovered (I had like to have said a general and) an insatiable Thirst, not only in some Church Lawyers and Creatures of Ecclesiastical Tyranny and Power; but also in some Ecclesiasticks themselves, and those not of the very meanest and most inferior Sort, but in some of more exalted Degree and Station, notwithstanding their specious Pretences to Spiritualization after the Visitatorial Power, &c. over these Things; and that maugre all the wise Provisions and Care of our Common and Statute Laws against such Incroachments, and even express Admonition and Advice what the Superior Temporal Laws, in such Cases, had determined and enacted, and what Penalties were annexed to the Transgression of such Temporal Laws, I say, notwithstanding these Things, still finding Provisions, Premunires, &c. through Want of Use, to have lost their due Weight, and Advice ineffectual, with some at least of these Gentlemen, I could not have excused myself to my own Mind, had I passed by these Matters totally without Observation, or with less Notice than I have here taken of them: And having thus given the Reasons of my own Conduct, I crave Leave to add what I take to be one of the greatest Supports, if not the principal Bulwark to the Reformation; namely, that these Authorities were given to Founders, &c. particularly in the Case of Charities.

rities. This Power, as I conceive, is allowed to encourage Donations thereto, as the same were always to be visited either by the Founders and their Heirs, or to be ruled and governed by Laws of their own framing and constituting; and as to Lay Impropropriations, I conceive it, their being in Lay Hands, and particularly in the Hands of the Nobility and prime Gentry, as they generally are, and as they all at first were, is of the greatest Security to the Reformation; for to argue from the Practice of the Clergy themselves; has it not heretofore been found, and I have some Apprehension that it might, even now, and will hereafter be found, that they, the Clergy, have been carried further, and have battled with more Warmth and Zeal, however their Religion stood affected, where Interest and Religion have been coupled together, and gone Hand in Hand, than when Religion has stood singly by herself, and on her own Legs, and Interest has had no Concern with her. And if this be so, to suppose the Laity to have no more Religion than any of those who have stronger worldly Reasons for being so, yet Interest to keep the Benefits and Authorities annexed to these Impropropriations must needs be supposed to bind them to that Reformation, which alone can maintain and keep them in the Possession and Enjoyment of them; so that these very Livings being impropriate is, in my Apprehension (supposing the Laity to act upon the same Motives with Men of Holy Church) of the greatest Security to Religion, as she now stands reformed and purged from the Idolatry, Superstition, Tyranny, and Fopperies of what she held before that Reformation brought about: To say nothing of their being a Counter-  
balance



balance to Church Power it self, which, from  
 some Authorities in the Books, a Man would  
 be inclined to think has been sometimes not a  
 little abused, it must be allowed, that by this  
 means, the Honour, Strength, Wealth, and  
 Learning of the Nation, are engaged in the  
 Maintenance of our most pure Religion. There  
 is another Thing, whereof some, perhaps the  
 less knowing of the Clergy, have most loudly  
 cried out and complained of, that putting these  
 Livings into the Hands of the Laity was rob-  
 bing the Church, and what not; but alas!  
 these ignorant Objectors do not give themselves  
 leave to consider what People, better ac-  
 quainted with these Matters, as having taken  
 pains in the Search of them, very well know,  
 namely, that these Appropriations were given to  
 the Support and Maintenance of idle, lazy, vi-  
 cious Monks and Friars, &c. who with the  
 Priests of those Times were the first Corruptors  
 of Religion, and not for the Support of true  
 Religion pure and undefiled; and therefore  
 when the Professors of our Holy Religion take  
 issue with them, it is imagined that they will  
 so readily calumniate Lay Impropriators, as  
 traitorous and Church-Robbers, &c. but on  
 the contrary, considering these were Estates ap-  
 propriated to Regulars, and by them prostituted  
 to the very wickedest of Purposes; and therefore,  
 we find from the Example of the Children of  
 Israel, not fit or lawful to be applied to Holy Use,  
 that where any such have been given to the  
 support of Men of Holy Church, or other godly  
 Uses, they will be surrendered to the Crown, to be  
 disposed to Uses less Holy; but if these Gentle-  
 men shall still think fit to continue Things  
 so profaned to Holy Use, they will not wonder

it is to be hoped, that Lay Impropriators shall use the same prophaned Things to honest Uses, and defend themselves in such Use against all Ecclesiastical Encroachments, though they think them not fit for the most Sacred; but to consider this Matter thought so great and just a Cause of Complaint a little further; from whom were these Estates taken? Why, from the religious or regular Clergy, when they were a Scandal to Religion, and sober Society, when their Bodies were dissolved, vanished and gone, and there were none such left to enjoy them. But then they should, says the Clerical Objector, have been given to the Church, or rather to Churchmen, which is much better, and indeed is what they always mean when they speak of the Benefits and Advantages of the Church. A Bishoprick is the Support of a Bishop, a Deanery of a Dean, and so down to the Country Vicar, whose Maintenance is his Vicaridge; but I am sorry again to have Occasion to tell these Church-Worthies, they are not knowing the Law, nor History, in this particular. These Benefices were appropriated to Regular Clergy, and never either given, or in their Donation intended for the Secular Clergy, and our present Claimants happen only to be Secular; as well, if not with more Reason, might the Lord Chancellor and Judges claim the Bishopricks and other Ecclesiastical Benefices, where their Predecessors were Bishops, or other Dignitaries, for that they exercise the same Temporal Jurisdiction; but our Claimants are nothing the same with the other, save that they both fall under the general Denomination of Clergy, with these unlucky Differences, that one happens to be Regular, the other meerly and simply Secular Clergy; the one has

owed wilful Poverty, too many of the others  
 have resolved if not Sworn to be as rich as  
 Jews; one has vowed Chastity, the other is  
 only bound to it in Common with other Christi-  
 ans, (except their Ordination and other reli-  
 gious Vows) whilst too many of them practice  
 the least; one has vow'd Obedience, the  
 other, it is to be fear'd, troubles not his Head  
 about it farther than serves his own Ends;  
 but however this Matter may be, I should be  
 content, for my Part, could it be with Con-  
 science, the Clergy, tho' not so regular, should  
 have these additional Benefices, on these Con-  
 ditions, namely, that as they become respectively  
 worse than the Laity generally are, they sever-  
 ally should for ever, irrecoverably for them-  
 selves and their Successors, forfeit these Tem-  
 poral Additions together with all other their  
 Temporal Estates, for them their Heirs, Exe-  
 cutors and Administrators to go to some laud-  
 able and general Temporal Use. Before I can  
 leave these Gentlemen I must crave Leave to  
 ask them, what is their Opinion of such, who  
 by Fraud or Art refuse to pay, or retain and  
 keep back their Tithes, Oblations, Obventions,  
 Mortuaries, Pensions, Proxies, Procurations,  
 Synodals, and other Dues? Are such honest, or  
 not, in the Opinion of these Gentlemen? I can  
 make no Doubt but they will answer, una-  
 nimo, that such are Wrong-doers, injurious,  
 Invaders of other Men's Rights, Church-Rob-  
 bers, Contemners of Temporal Laws, which  
 have in their great Bounty given, or allowed  
 and indulged to the Clergy these Benefits, and  
 here I will venture to tell these Gentleman that  
 their best and most substantial, if not only,  
 Right to these Advantages is by the Indulgence



of our Princes, and the Common and Statute Laws: And if Laymen by like Royal Favour, and by Laws, as strong and as binding as those the others hold by, are lawfully and rightfully in of Lay Fees, &c. exempt from all Ordinary Jurisdiction, &c. and are sole (under the Supreme) tho' Lay, Visitors, &c. themselves of their own Charities, &c. what shall be said of those Clergymen, who shall be found not only injuriously invading their Neighbours Property, weakening the Security of the Reformation, and acting in Defiance to known Laws; (for if any of them know them not, it is their Crime that they do not seek Information from those who do, and learn the Laws necessary to their Functions;) but also most ungratefully to their Benefactor and traitorously to their Sovereign acting to the Disinherison of the Crown itself; to whom often, if not always, these Men have the highest Personal Obligations, and so owe the greatest Returns of Gratitude as well as Duty and Allegiance? I say, what shall be said to, or of such Men? But that their Crime is too big for a Name; and that their holy Character is no small Aggravation of their Sin; if they are, not only, as all Christians are, but also by their solemn Oaths and Promises made and taken at their entring into their several Orders, still further bound to be Examples of Virtue and Piety? They are surely, a fortiori, to be just and honest, and ought to leave others in the quiet Enjoyment of their Temporal Inheritances, and of all Immunities and Authorities incident thereto, as well as their Sovereign Lord and Benefactor to the Exercise of his rightful Jurisdiction, whether Temporal or Ecclesiastical.

1. General.

1. **C**harity is not barred by length of Time, or any Statute of Limitations.

2 Vern. 399.

2. There's no Statute of Limitations against God and Religion; what was once given to Charity ought to be so applied, and what had been imbeziled ought to be restored. 2 Vern. 389.

3. A Gift to Charity must be for Relief of Necessity only, and not for Ornament, or Superfluity, it must be according to, not against, Law. Du. Ch. Uses, 132.

2. Rules.

1. **P**ANIS Egentium Vita Pauperum, & Qui defraudat eos homo Sanguinis est. 8 Co. 131.

2. Summa est Ratio quæ pro Religione facit. 2 Ch. Ca. 18. Jenk. 233.

3. Favendum est Ecclesiæ quam Parsonæ. 1 Ro. Rep. 452.

4. Trustees for a Charity may improve for the Benefit of the Charity, but can do no Act to prejudice it, in Breach of the Founders Rules. 2 Vern. 412.

5. If one will receive a Charity with the Yoke tied to it by the Founder, he must bear it: The Charity cannot be severed from the Yoke; if they will have the one, they must submit to the other. Skin. 491. Vide ante General.

3. *Colleges, and Hospitals.*1. *The Difference.*

**T**HE Difference between an Hospital and a College is only in Degree; an Hospital is for those who are poor, and mean, and low, and sickly; a College is of another Sort of indigent Persons; but it hath another Intent, to Study in, and breed up Persons in the World, who have not otherwise where-with to do it; but still is as much within the Reason of an Hospital: And if in an Hospital the Master and Poor are incorporated, it is a College; having a Common Seal to act by, though it hath not the Name of a College (which always supposeth a Corporation) because it is of an inferior Degree: And in the one Case and the other there must be a Visitor; either the Founder and his Heirs, or one appointed by them; and both are Eleemosynary. *Skin. 484.*

2. All Colleges in the Universities are Lay Corporations, and though the Members of the College may be all Spiritual Persons, yet the Corporation is a Lay and Temporal, because the Institution and End is Temporal, viz. to advance Learning. *Salk. 672.*

4. *Charity must not hurt another's Right.*

**A** Copyholder surrendered to the Use of a Grammar School; the Lord is compellable to admit the Tenant; because it is not pre-



prejudicial to him as he has but one Tenant, after whose Death his Fine is due, as it was before, and the Use of the Land is only in the Corporation. *Ranshaw* and *Robottoms* Case at *St. Albans*, *aliter* had the Surrender been to a Corporation; for then the Lord would have been hurt in his Services; the same if the Custom of the Manor be to devise to one only, and to have a Harriot after his Death, the Tenant may not surrender to two to a Charitable Use, because the Lord is delayed of his Harriot. *Du. Ch. Uses* 140.

5. *What may be given thereto, or out of what, and when.*

1. **N**O Charity can arise out of Usury. *Du. Ch. Uses* 136.

2. A Copyhold may be charged with a Charitable Use. *Tot.* 92. *Hern's Ch. Uses* 97.

3. A Debt owing by Statute, Judgment, Recognizance, or Bond, which is but a *chose en action*, was given for the Creation of a School, and decreed a good Appointment within the Statute to maintain a Charitable Use. *Herne of Ch. Uses* 94.

4. A Debt in Action given for the Erection of a School good. *Tot.* 91, 92.

5. The Statute 9 Geo. 2. of *Mortmaine* recites, That whereas such Gifts are prohibited and restrained by *Magna Charta*, and divers other wholesome Laws, as prejudicial to and against the Common Utility, and to the Disinheriting of lawful Heirs; for Remedy whereof

whereof it is enacted, That from and after 24 June 1736. No Manors, Lands, Tenements, Rents, Advowsons, or other Hereditaments, Corporeal or Incorporeal whatsoever, nor any Sum or Sums of Money, Goods, Chattels, Stocks in the Publick Funds, Securities for Money, or any other Personal Estate whatever, to be laid out or disposed of in the Purchase of any Lands, Tenements, or Hereditaments, shall be given, granted, aliened, &c. or any ways conveyed or settled, to or upon any Person or Persons, Bodies Politick or Corporate or otherwise, for any Estate or Interest whatsoever, or any ways charged or incumbered, by any Person or Persons whatsoever, In Trust or for the Benefit of any Charitable Use whatsoever; unless such Gift, Conveyance, &c. of any such Lands, &c. Sum or Sums of Money or Personal Estate, (other than Stock in the Publick Funds) be and be made by Deed indented, sealed and delivered in the Presence of two or more Credible Witnesses, twelve Kalendar Months at least, before the Death of such Donor or Grantor, (including the Days of Execution and Death) and be Inrolled in the High Court of Chancery, within six Kalendar Months next after the Execution thereof; and unless such Stock be transferred in the Publick Books usually kept for the Transfer of such Stocks, six Kalendar Months at least before the Death of such Donor or Grantor (including the Days of the Transfer and Death) and unless the same be made to take Effect in Possession, for the Charitable Use intended immediately from the making thereof, and be without any  
Power

Power of Revocation, Reservation, Trust, Condition, Limitation, Clause or Agreement whatsoever; for the Benefit of the Donor or Grantor, or of any Person or Persons claiming under him; provided that nothing in the said Statute before mentioned relating to the Sealing and Delivery of any Deed or Deeds, twelve Kalendar Months at least before the Death of the Grantor, or the Transfer of any Stock six Kalendar Months before the Death of the Grantor or Persons making such Transfer, shall extend, or be construed to extend to any Purchase of any Estate or Interest in Lands, &c. or any Transfer of Stock, to be made really and *bona fide*, for a full and valuable Consideration actually paid, at or before the making such conveyance or Transfer, without Fraud or Collusion. And it is thereby further enacted, That all Gifts, Grants, &c. Transfers, and Settlements whatsoever, of any Lands, &c. or of any Estate or Interest therein, or of any Charge or Incumbrance affecting or to affect the same, or of any Stock, Money, Goods, Chattels, or other Personal Estate or Securities for Money, to be laid out or disposed of in the Purchase of any Lands, &c. or of any Estate or Interest therein, or of any Charge or Incumbrance affecting or to affect the same, to or in Trust for any Charitable Uses whatsoever, which should at any time after the said 24th of *June* be made in any other Manner or Form, than by the said Act is directed and appointed, should be absolutely, and to all Intents and Purposes, null and void; save to the Universities in *Great Britain*, or Colleges, or Houses



Houses therein, or the Colleges of *Eaton*, *Winchester* and *Westminster*; provided that no such Colleges or Houses which hold so many Advowsons of such Benefices, as is equal to Half the Numbers of their Fellows, or Students be capable of Purchasing, &c. any other Advowsons by any Means whatsoever; the Advowsons, as are annexed or given for the better Support of the Headships, not to be computed therein, and provided the said Act extend not to *Scotland*.

6. In *Canc.* 26.

\* April 1740 *Asbburnham* and *Bradshaw*.

The Case was this; One made his Last Will and Testament before the Commencement of the above Act, and died after the Commencement; on this Case the Lord Chancellor directed, that the Opinions of all the Judges should be taken, on the Question a good Will or not; and all the rest of the Judges (*Denton J. Sick*) were of Opinion that the Will was good, notwithstanding the Intervening of the Statute; and so his Lordship was pleased to decree, and that the Trust of the Charity be carried into Execution.

\* See Case in *Canc.* 28 July 1740. *Adlington* and *Cann*.

6. To pursue the Intent of the Founder.

1. THE Intention and Will of Founders or Donors shall bind the King, tho' not named in the Statute, as appears in *Statuto*

*tuto Templariorum, Anno 17 E. 2. where it is said, Ita semper quod pia & celeberrima Voluntas Donatorum in omnibus teneatur & expleatur, & perpetuo sanctissime perseveret, &c. 11 Co. 73. a.*

2. A Decree of Commissioners of Charitable Uses was reversed for varying from the Intent of the Founder or Donor. *Cases in Law and Equity, 2 Part, Wright and Hobart's Case, 64, 65.*

3. *Plf. 10 Geo. 2. The Attorney Gen. and Stephens.*

The Case was, Dr. Radcliffe, the late Physician, by Will devised 300*l. per Annum* to two Persons to be chosen by the Archbishop of Canterbury and certain other Trustees out of University College in Oxon, which Sum he directed to be paid them for ten Years for their Maintenance, five Years whereof they were to spend in *England*, in the Study of Physick, and the other five abroad; the Defendant was one so chosen and studied here according to the Directions of the Will, and for that Time he received his five Years Salary; but after did not go abroad on account of his ill State of Health, and thereupon *Anno 1730* resigned to the Trustees, who accepted his Resignation, and chose another in his Room, and *Anno 1735* the present Information was exhibited against the Defendant, that he might account for the five Years Salary, by him thus received. Mr. Fazakerley for the Defendant argued, that in a late Case which came before the House of Lords, upon an Appeal, their Lordships were of Opinion that the Word, *Maintenance*, included Education; and therefore,

fore, though that Word was used in the present Will, *Education* must be intended by it, as implied. He argued, that when the Defendant had spent Half his Time in his Education here in *England*, and was prevented by ill Health from going abroad, and thereupon had resigned, and his Resignation accepted, and another chosen in his Stead, he submitted it, that the present Bill must be thought an unreasonable one. My Lord Chancellor was of that Opinion, and said, that the Name of the Case cited was *Gandy and Austis*, so dismissed the Information.

### 7. How favoured.

#### 1. General.

1. IF a Daughter being Heir gives the Lands descended upon her to Charity, and then a Son is born; he shall avoid the Gift; but if the Father had been Feoffee, *sur* Condition that he and his Heirs should give the same Lands to Charitable Uses, and the Daughter had given, *ut supra*, before the Son born, the Son had been bound, for this clear Reason; because the Daughter in this Case had done no more than the Son himself should have performed by Reason of the Condition. *D. Char. Uses* 138, 139.

2. A Copyholder surrenders to the Use of his last Will, and thereby devises that the Parson, Church-wardens, and four honest Men of the Parish of *Allhallows*, should sell



his Copyhold for a charitable Use, the Copyholder dies, and his Heir is admitted, the Parson, &c. sell the Land to J. S. the Heir was compelled to surrender accordingly. *Guiddye's Case*, decreed 4 Ja. in *Canc'. D. Char. Uses* 140.

3. It was urged in this Case, that in Cases of Charity, where the most speedy and least expensive Methods ought to be chosen, an Issue ought not to be directed, but that the Court ought to decree upon the Proofs. *Bishop of Rochester and Attorn. Gen', March 1721.*

2. *By Construction.*

1. Upon a Will of a Lease of the Rectory of *Hains in Com' Wilts*, resolved by *Egerton and Popham*, that a Devise of Money to be distributed to twenty of the poorest of his Kindred, shall be a good Devise; although it doth not appear that he had any poor Kindred. *Tot. 92. Vide Charities, favoured in general.*

2. In the Case of *Kerry and Detbick*, adjudged a Devise to one and his Heirs, of the Rents and Profits of his Land, this is a Devise of the Land it self: Also resolved, when one deviseth the rest of his Land to a Charitable Use, it shall be taken largely for a Devise of the Rent then reserved, or after to be reserved upon an improved Value. *Herne of Charitable Uses* 77.

3. Money was given for the Good of the Church of *Dalk*, and resolved good, notwithstanding these general Words. *Herne of Char. Uses* 97.

4. When

4. When no Use is mentioned or directed in a Deed, it shall be decreed to the Use of the Poor, tho' the Feoffees be Gentlemen living out of the Town, and no Inhabitants within the Town. *Herne of Char. Uses* 100.

3. *Where not good, as a Will, whether good as an Appointment.*

1. *Collison* seised of Lands in Fee in *Papa-Street* of *Eltham*, 25 H. 8. devised the Rents of his Lands to his Executors for Reparation of Highways within the Parish for ever; and upon a Reference to *Mountague* and *Hobart* Ch. Just. out of Chancery, they certified it good. If one demise the Rents and Profits of his Lands to another and his Heirs, this is good of the Land it self; and secondly, though it were void in Law, because made 25 H. 8. so long before *Stat. 32 & 34 H. 8.* before which no Lands were devisable, but customary Lands; yet by the Statute 43 *Eliz.* it is made good, and shall be taken within that Statute for a good Limitation and Appointment to a Charitable Use; and it was decreed according to their Certificate. *Herne of Char. Uses* 81, 82.

2. *Stoddard* devised a Rent of 10 l. a Year out of his House called the *Swan with two Necks*, in the *Old Jury*, *London*, for Maintenance of two Scholars at *Oxon* and *Cambridge*, and willed that one *Hugh*, the Scrivener, should put it into Writing, which was accordingly done; this being found by Inquisition was decreed, and that confirmed on Appeal; for though by Law Rent cannot be created or granted without Deed or Will

Will in Writing, yet this nuncupative Will was good to create the Rent to a Charitable Use, by the Words of the Statute of Limitation or Appointment; for though not a good Gift, yet it is a good Limitation or Appointment. *Herne of Char. Uses* 98, 99. Note; *This before Statute of Frauds, the Law being now otherwise under that Statute.*

3. Money was given to maintain a preaching Minister; this is not a Charitable Use named in the Statute; yet by the Lord Keeper and two Judges, it was decreed to be good, and the Use a Charitable Use within the Equity of that Statute; and the Executor accordingly was ordered to pay the Money for the Maintenance of it. *Herne of Char. Uses*, 101, 102.

4. Lands were given to the Churchwardens of a Parish, to a Charitable Use; tho' the Devise was void in Law, yet decreed good in Chancery, by the Words *limited and appointed within the Statute.* *Herne of Char. Uses* 101.

5. Information was, that *Stephen Newman* seised of Lands, devised them to *Trinity College in Cambridge*, for the Maintenance of a Scholar there, and in the Will was this Clause: *If any Cavil shall hinder this Devise, or that the same cannot go to the College, by Reason of the Statute of Mortmain, then I devise them to Robert Newman and his Heirs*; and under Pretence that by the Statute of Mortmain the College could not have them, *Robert Newman* entered and held the Possession; whereupon Attorney General brought this Information to have the Lands established with the College, and this all appeared upon the Bill and Answer; and



it being a Charity, it was held by Lord Keeper *Bridgman*, that it ought to be established with the College by Statute 43 *Eliz.* notwithstanding the Statute of Mortmain, and notwithstanding the Clause in the Will; and so it was decreed; and Lord Keeper said, that this Case differed not from *Lloyd's Case* in *Hob.* 136. 1 *Lev.* 284.

6. *Prat* devises his House in *St. Sepulcher's* Parish to *St. John's College*, he being Tenant *in Capite*, and the Corporation misnamed, which was a void Devise to pass the Lands, and so on former Proceedings certified by the Opinion of the Judges. Lord Keeper notwithstanding decreed it a good Appointment within the Statute 43 *El.* but then it was objected, if so, that then the Process and Method appointed by the Statute ought to be held, (*viz.*) a Commission, and Inquisition, and Decree by Commissioners, and so to come at last to a final Decree by Lord Chancellor, or Lord Keeper; but not to sue by original Bill, as in this Case; but the Lord Keeper decreed the Charity, though before the Statute no such Decree could have been made. 1 *Chan. Ca.* 267.

7. Tenant in Tail of the Manor of *Midhill* in *Berks* made a nuncupative Will; which being after reduced into Writing, was proved as such by three Witnesses, and by this he devised, that his Executors should purchase a Parcel of Ground in *Cricklade* in *Wilts* for the Erecting of a Free-School there, and gave to the said School 20 *l.* per Annum Rent, to be paid out of his said Manor of *Midhill*, and died: This Will and the Death

Death of the Testator were both before the Statute of Frauds, and also the Probate therefore in the Spiritual Court, as a nuncupative Will; and in Pursuance of this Will the Executors bought the Ground in *Cricklade*, and built the School, and the Commissioners for Charitable Uses decreed the Issue in Tail of the Manor of *Midhill* to pay the Arrears of the 20 *l.* a Year Rent to the School; the Issue in Tail excepted to the Decree, and the Exception coming on before Lord Chancellor *Harcourt*, it was insisted for the Decree, that though this was void as a Will, yet it was good as an Appointment by *Stat. 43 Eliz. of Char. Uses*. As if Tenant in Tail had devised Lands without levying a Fine, or suffering a Recovery; or a Copyholder had devised to Charity, without Surrender to the Use of his Will, such Devises would be made effectual. His Lordship allowed the Exception and reversed the Commissioners Decree; for that at Law, Land, or a real Estate, were not devisable, and by *Stat. 32 H. 8* it is as much required that a Will of Land should be in Writing, as that by Statute of Frauds it is required that there should be three Witnesses; and as in *Johnson's Case* decreed by Lord Chancellor *Cowper*, a Devise of Lands in Writing to a Charity, since the Statute of Frauds, but not attested by three Witnesses, was held to be void, so a Devise of Land without Writing should be void also, especially it being by Tenant in Tail, and of a Rent too, which cannot pass but by Deed; and it would be very dangerous to allow of Nuncupative Wills of Lands.

*Sed quære, says the Reporter, and vide Du. Char. Uses 81. Stoddard's Case, where one fore the Statute of Frauds devised a Rent of ten Pounds per Annum out of Lands to a Charitable Use, and willed that one Hugh, the Scrivener, should put it into Writing, which was accordingly done; and decreed that this Nuncupative Will was good; for though a Rent cannot be created, without Deed, yet by the Words of 43 Eliz. it may be appointed without Deed, and though the Nuncupative Will be void, as a Will, it is good as an Appointment, (thus far the Case) and it seems (continues the Reporter) that the Statute 43 Eliz. which makes these Appointments to Charities good, being subsequent to the Statute 32 H. 8. of Wills, supercedes and repeals that Statute; but it is true, that the Statute of Frauds and Perjuries, being subsequent to the Statute 43 El. does repeal that Statute; and therefore since the Statute of Frauds, &c. an Appointment of Lands to a Charity by a Will, not attested by three Witnesses, is void. 2 Peer Will. fo. 247. Jenner con. Harper. Prec. Ch. 389, 390, 391. S. C. and Gilb. 44, 45. S. C.*

8. If a Will be defective it shall not operate as an Appointment to support a Charity. *Prec. Chan. 390.*

9. A Will wanting Witnesses will not operate as an Appointment to a Charity by the Statute 43 Eliz. *Prec. Chan. fo. 270 & 389. See and note 3 Rep. Ch. 150, &c.*

10. Parol Devise to a Charity out of Lands, being defective as a Will, cannot be supported as an Appointment; because being defective as a Will, which was the Manner of Convey-

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ance he intended to pass it by, it can have no Effect as an Appointment, which he did not intend; and of this Opinion my Lord Chancellor seemed to be, and decreed accordingly in the principal Case. *Prec. Chan.* 391.

II. Lands devised to Charities, and the Will not published in the Presence of three Witnesses, as the Statute of Frauds requires, not good either as a Will or an Appointment; but was good for so much as was Copyhold, they passing by the Surrender, and not by the Will. And tho' there were three Witnesses to a subsequent Codicil, that cannot help the Will. *2 Vern.* 597, 598.

Ca. 536. *Attorn. Gen.* con. *Barnes & ux.* See and note *3 Mod.* 262. *Hob.* 136. *Mo.* 888. It was insisted in the above Case, that the Statute of Frauds and Perjuries makes Wills of Lands absolutely void, if not three subscribing Witnesses thereto, and the Statute is to be strictly taken to prevent Frauds in the Time when People are easiest to be imposed on. *Vide Gilb. Rep.* 5. where Lord Chancellor seemed of this Opinion.

4. *Where have been long dormant.*

Money long since given to a Charitable Use decreed with Interest. *Tot. Rep.* 91. *Vide antea General.*

5. *Defects supplied. for.*

1. *Where it would be void in any other Case as being against the Rules of Law.*

1. If a Feoffment be made to Dean and Chapter, on Condition to perform a Charitable Use, it is good, tho' they cannot be seised to another's Man's Use. A Bankrupt, an Accountant, a Recusant, may be Feoffees, or Donees to Charitable Uses. *Du. Char. Uses* 138.

## Jura Ecclesiastica.

2. A Lease for Years is made, rendring Rent to a common Midwife for poor Women, good, though a Reservation of Rent cannot, at Common Law, be to a Stranger. *Du. Ch. Uses* 140.

3. If there be two Jointenants, and one release to the other to a Charitable Use, good; *aliter*, if one grant to the other for such Use; for Jointenants cannot grant one to another. *Du. Char. Uses* 140.

4. A Man makes a Feoffment with Power of Revocation, and then sells the Lands to a Charitable Use, good, and he cannot revoke. *Du. Char. Uses* 140.

5. A Man devises a Term of Years to a Woman during her Life, the Remainder to another to a Charitable Use, tho' the Remainder limited be void, yet the Executors of the Woman, who shall have the Residue of the Term, shall be charged with the Use. *Du. Char. Uses* 140.

6. A Man devised by his Will Monies to a Charitable Use to be bestowed for poor People, and the Residue of his Goods to be imployed to such Uses as his Feoffees shall think meet, Devise is good, tho' to a Corporation. *Tot.* 95.

2. *Where the Poor, either are not a Corporation, or not one capable.*

1. A Devise to the poor People maintained in the Hospital in the Parish of St. Lawrence in Reading for ever. Exception was taken, that the Poor were not capable by that Name, for no Corporation; yet because the Plaintiffs (the Mayor and Burgessees)

gesſes) were capable to take Lands in Mortmain, and did govern the Hoſpital, It was decreed the Defendant ſhould aſſure the Lands to the Mayor and Burgeſſes for the Maintenance of the ſaid Hoſpital. *Tot.* 93.

2. *Ridley* ſeiſed of Copyhold Lands in *Barking* in *Com' Eſſex* deviſed, that the Parſon and Church-wardens in *Thames-Street London*, and four honeſt Men of that Pariſh, ſhould ſell the Land, and imploy the Money for the Poor and Charitable Uſes in that Pariſh ; and it was objected, that the Deviſe was void ; becauſe the Parſon and Church-wardens were not a Corporation to take Land out of *London*, nor to ſell it for ſuch Uſes ; but it was decreed, that the Deviſe was good, and that they had a good Authority to ſell the ſame. *Totb.* 93.

3. *Where given by Tenant* in Capite.

1. An Annuity deviſed out of Lands holden *in Capite* to Charitable Uſes, judged good. *Du. Char. Uſes* 94.

2. This Caſe, by the King's Command, was referred to the Juſtices of the King's Bench, and was thus: *Aſcough* ſeiſed in Fee of the Manor of *D.* holden by Knight-Service *in Capite*, deviſeth the ſaid Manor to be ſold by his Executors ; Part of the Money to be paid to his Wife, and Part in ſeveral other Legacies, and the Reſidue thereof he gave to Charitable Uſes, (*viz.*) for the marrying of poor Maidens and Relief of Priſoners, &c. The firſt Queſtion was, whether this was a good Deviſe to



bind the King and to bar him of his primer Seifins by the *Stat. 43 Eliz.* of Charitable Uses; and all the Justices held clearly that this should not bar the King for his Interest of Wardship, Livery, or primer Seifin; because general Words where the King is not named shall never bind or bar him. The second Question was, whether such a Devise by the said Statute be good against him for the whole, and shall bar the Heir to claim a third Part; and they also resolved, admitting it to be a Conveyance within the Statute, yet it is void against the Heir for the third Part; for by the 32 & 34 *H. 8.* he hath no Power to dispose but of two Parts; so for the third Part it is clearly void. The third Question was whether this were a Conveyance within *Stat. 43 Eliz.* because here is not any Disposition of the Lands to Charitable Uses, but an Appointment, that the Land shall be sold and the Money divided, Part to his Wife (who is clearly out of the Statute) another Part to satisfy divers Legacies, and the Residue, which, in truth, was the greatest Part, to the said Charitable Uses; but as to this, they all resolved not. *Cro. Car. 525, 526.* See and note 3 *Rep. Ch. 68, 69.* 2 *Vernon 454.*

#### 4. Where given by Tenant in Tail.

1. Tenant in Tail settles Lands for a Charity, and *Anno 1652* a Decree was by the Commissioners of Charitable Uses for applying these Lands to the Charity, then the Estate-Tail is spent, and *Tay*, the now Plaintiff, being Remainder-Man in Fee and an Infant,

tant, put in Exceptions to the Decree, that he ought not to be bound by it, not coming in under Tenant in Tail. This came on before the Lords Commissioners, who were all of Opinion, that all Appointments of Tenant in Tail to a Charity, are by the Statute good and binding against the Remainder-Man, as well as against the Issue in Tail, and therefore confirmed the Decree with Costs. *Prec. Ch.* 16, 271. *Gillb.* 44.

2. The Question was, whether a Devise by Tenant in Tail, who levied no Fine, nor suffered any Recovery, be a good Appointment, within the Statute of Charitable Uses, against the Defendants who claimed under the Intail; the Commissioners below had decreed for the Charity, and now on Exceptions it was confirmed by Lord Keeper, who said, he was of Opinion, that the Intent of the Act of the Queen for Charitable Uses, was to make the Disposition of the Party as free and easy as his Mind, and not to oblige him to the Observance of any Form or Ceremony either of Lease or Release, or Common Recovery, or Fine, &c. and cited the Case of *Collifon* in *Hob.* where before the Statute of Wills, a Will of Land made 15 H. 8. devising the same for Repair of Highways adjudged good within the Statute of the said Queen; tho' made long after; *Mo.* 888. the same Case, but there called *Rolle's Case*, *Griffith Lloyd's Case* in *Hob.* A Devise to *Jesus College* being in Mortmain and void at Law, yet allowed good within the Statute of the Queen. *Damus's Case*, *Mo.* 822. A Feme Covert, Administratrix, devises to Charity, and held good. *Rivet's Case*,

Case, *Mo.* 890. Devise of a Copyhold without a Surrender to the Use of the Will held good, and so in *Reppington* and *Reppington*, and the Town of *Chaid* and *Opie* and *Higgins* against the Town of *Southampton*, on the Will of one *Mill*, 26 *June* 1671. A Devise out of a Manor held *in Capite* decreed good, being to a Charity, tho' otherwise the Will void, as to a third Part. *Wild* and *Windham*, who assisted in that Case, saying, that the Statute of the Queen was an enabling Statute, giving Power in any Manner to dispose to Charitable Uses. In the Case of Sir *John Platt* and *St. John's College*, 27 *Car.* 2. a Misnomer supplied. 1 *Ch. Rep.* 267. *Prec. Ch.* 16, 271.

3. The Reason why a Devise by Tenant in Tail to a Charitable Use shall be good against the Issue in Tail is; because the Testator had it in his Power by Fine to have barred the Issue; and tho' he did not live to perform the Ceremony, yet as a Will being perfect and compleat by the Aid 43 *Eliz.* it might work as an Appointment; for that at Common Law there were no Fines, nor Recoveries, nor Estates-Tail; and therefore that Statute was a restoring of the Common Law. So of a Deed of Bargain and Sale, tho' not inrolled, by Statute 27 *H.* 8. *Prec. Ch.* 391.

5. *Where given by Copyholder.*

A Copyhold Inheritance not surrendered to the Use of the Will to a Charity, supplied. 3 *Ch. Rep.* 220. *Mo.* 890. 2 *Vern.* 454

6. *Where*



6. *Where given by Feme Covert.*

The Feme having Power to dispose of her Personal Estate, which only comprehended such Personal Estate as she had before Coverture, having (after being married) in a secret Manner gotten into Possession of a large Personal Estate by her Father's Death, which she concealed from her Husband, disposes of her Personal Estate to Charity; yet decreed that what was so concealed should not be discovered and taken from the Charity and given to the Husband, so as to disappoint the Charity. See Case, *Pilkington and Cutbertson* in House of Lords. 11 March 1711.

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7. *Whether may lay the whole Burden on any one or more, or must seek several Remedies in Proportion.*

1. A Decree upon the Statute of Charitable Uses being made for the Town of *Raisen*, and the Defendant possessing some Part of the Land liable to the Money decreed, insisted on paying but his Proportion, there being several others who had Lands chargeable with the same Use, as well as the Defendant; the Court declared, that a Decree being made for the Town, they may lay the Whole on any one liable, and he to pay the Whole; but he may compel the others to contribute. 1 *Ch. Rep.* 91, 92.

2. Where Money to Charity is issuing out of Lands in Possession of several, they may levy all upon one, or otherwise at their Pleasure; but the rest shall contribute, on the

the Application of the other Parties. 1 Rep. Ch. 91, 92. 3 Vol. 22 Eq. Abr. 98, 99. Salk. Attorney Gen. and Shelley. Vide Salk. Charity, or Charitable Uses.

### 8. To take Improvements.

1. Davis erected an Almshouse in *Henington Hastings* for Eight poor Men, and being seised of Lands in *T. M.* and *B.* then let at 10*l.* a Year, devised his Rents for the Maintenance of the said poor in the said Almshouse, and dies, and his Heirs pays the 10*l.* yearly at the Almshouse, and at the End of the Term demises again at 40*l.* a Year; the Commissioners decree the whole Lands and Profits to the Charity, and the Arrears of the improved Rent, taken by the Heir from the Expiration of the old Lease, till the Decree, and that the new Lease should be void and yielded up; and upon Appeal in Chancery brought by the Heir, and Exceptions taken to the Decree, the Lord Keeper referred the Case to the Judges, principally, whether if one devises the Rent of his Lands to a Charitable Use, if by this Devise the Land passed; and they certified their Opinion, that by Devise of the Rents of the Lands to a Charitable Use the Land it self passed, &c. and the Commissioners Decree was affirmed. *Herne of Char. Uses.* 76, 77.

2. There was a Disposition in 1579 (which was before the *Stat. 43 Eliz.* for Charitable Uses) to a Charity, Part of the Lands were of a defective Title, and the whole Disposition void, being before the Statute; yet an Agree-

Agreement was had between the Parties interested and Trustee for settling the Use designed, so much as was proportionable in Value to what the Donor had to give; and this was all done before the Statute, and long Leases made of the Ground to several Tenants at small Rents to build, who had thereby improved the Ground that was but 20*l.* a Year to 150*l.* a Year. The Commissioners by Decree avoided the Tenants Leases, they not being, in Strictness of Law, good. On Exceptions to this Decree, the Court declared, tho' the Charity was precedent to the Statute, yet the Statute subsequent had a Retrospect, and would make it a good Appointment that was not so before, but void. And it was declared, that so as the Terretenants be no Losers, they ought not to be Gainers in the Case of Charity, and so ordered, that during the Terretenants Leases there should be an Augmentation of 50*l.* *per Annum* allowed by them in Proportion to the poor. 1 *Ch. Case* 195.

3. The Reversion in Fee of divers Lands, on which 70*l.* *per Annum* Rent was reserved, was given to the Corporation of Coventry, and the whole 70*l.* reserved Rent was appointed to particular Charities; after the Leases expired, the Rents were considerably increased, the Overplus to be applied to the Augmentation of the Charities, and not to be for the Benefit of the Corporation. See the Case of the Mayor of Coventry and the *Attorn. Gen.* 8 May 1720 before the House of Lords. *Vide* 2 *Vern.* 397. and 2 *Ch. Cases* 53.

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*the Charity*9. *Arrears to go in Augmentation of*.

\* *Paf. 10 Geo. 2. in Canc. Clerk and others against Brabant and others.*

This Bill was brought for the Possession of Lands subject to a Charity decreed to the Plaintiff; the Fact appeared to be thus. The Charity consisted of three Lectureships (*viz.*) *Hempsted, Barkhempsted, and St. Albans*, and there had been reported from 1660 to 1678 an Arrear amounting to 540 *l.* which was directed to carry Interest at 6 *l. per Cent.* and to be laid out in Augmentation of the Charity, and there being a former Arrear due to the Lecturers *Anno 6 Will. 3.* a Decree was pronounced for putting them into Possession of the Premises in Order that they might receive what was so due to them, together with the growing Charity, and pay over the rest of the Money, for the Benefit of the Augmentation, under this Decree as well as under a Letter of Attorney from one of the Lecturers. *Dr. Brabant*, who had the other two Lectureships, took Possession of the Premises, and kept the same to the Time of his Death; after which his Son continued such Possession, and they (the Father and Son) received all the Arrears, save 23 *l.* 17 *s.* 6 *d.* and whether, on Payment of this Sum, the Plaintiffs, who were Purchasers, should not be let into Possession, was the Question, for which my Lord Chancellor decreed.

10. *Whether to contribute.*

1. A Man by Will gave several Legacies, and particularly 40*l.* to Charity; the Spiritual Court would pay the Charity first, and not in Average or Proportion with the other Legacies; Plaintiff brought the Bill setting forth the Matter, that there was a Deficiency of Assets, and moved for an Injunction, but Motion refused; for that the Civil Law, was the Law by which Legatory Matters were to be determined, and the Spiritual Court had undoubtedly the Jurisdiction thereof; and if by their Law a Preference was given to Charities, he could not alter that in that Point, neither would direct Security to be given for Refunding, in Case of Deficiency of Assets. 1 *Vern.* 230, 231. *Case 226. Fielding and Bond.*

2. By the Civil Law, if a Man devises out of his Personal Estate to a Charity, and gives also a Legacy thereout to others, and the Personal Estate fall short to pay all, the Charity should be preferred; but here that Rule will not hold; but the Charity must abate in Proportion. *Prec. Ch.* 390.

3. It was resolved in the Cause *Masters and Masters*, that the Charity, tho' preferred by the Civil Law, yet ought to abate in Proportion; for they were but Legacies. 1 *P. Will.* 422, 423.

4. One *Penning* of *Saffron Walden* in *Essex* and others subscribed to the Charity School there of twelve Boys and twelve Girls, which Subscription was only during the Pleasure of the Benefactors. *Penning* took Delight in  
 2 seeing

seeing these Charity Children, and declared he would leave them something at his Death. There was also a Free-School in the same Town, and *Penning* by his Will gave 500*l.* to the Charity School, and several Money Legacies, and died. The Executors insisted on Want of Assets. Lord Chancellor; tho' the Free-School be a Charity School, yet the Charity School for Boys and Girls went more commonly by that Name, and as the Testator was fond of the latter, and had declared he would leave them something; therefore that, and not the Free-School, is intitled; so let the Legacy be brought into Court with Interest from the End of the Year after the Testator's Death, and in Case of Deficiency of Assets, let all the Pecuniary Legacies, as well that to the Charity, as the rest abate in Proportion; for tho' the *Romans* preferred a pious or Charitable Legacy to others; yet our Law does not, they being all but Legacies, and equally intended by the Testator to be paid, it would be hard that one of them by being preferred should frustrate all the rest; besides the other Legacies being given to several of the Testator's poor Relations, they are Charities also. And because it is objected, that on the failing of the Charity School, the Charity ought to revert to the Founder; therefore in such Case, I give Liberty to the Parties to apply again to the Court. 1 *P. Will.* 674, 675.

5. Charity Legacies, being but Legacies, must on a Deficiency abate in Proportion. 2 *P. Will.* 25. But Charities of three Pounds each Parish, to the poor of three several Parishes, the Court looked upon as Part of the



Funerals, and as Doles thereout, and therefore held, that no Abatement ought to be made out of them. 2 P. Will. 25.

11. *Out of what to be paid and secured, where no particular Estate or Fund appointed for that Purpose.*

1. A. deviseth Twenty Pounds per Annum to a preaching Minister, and dies, leaving Lands and Assets; Defendant refuseth to pay; but charged out of the Assets to buy Lands to perpetuate it. Tot. 96.

2. A Devise of Twenty Pounds a Year to a preaching Minister, and the Devisor makes his Wife Executrix, and dies, leaving Lands and Assets in Goods. The Executrix refuseth to buy Lands, or a Rent of that Value; the Lord Keeper and two Judges decree the Executrix to buy Lands to that Value, and to assure it for the Charitable Use. *Herne of Charit. Uses* 102.

12. *Trustees to execute the Trust, or transfer.*

1. If Lands or Goods are given to one by Will, or a Remainder limited to one by Deed, to perform a Charitable Use, if the Devisee will refuse the Legacy, or the Grantee wave his Remainder, and that by Fraud or Covin (or that they do not care for the Charge or Trouble of the Trust, or otherwise, as I conceive it) they are compellable to take the Land and to perform the Use. *Du. Ch. Uses*, 139 — or to assign to others who will.

2. In Case of Misbehaviour, or Misapplication by Trustees of a Charity, Chancery

will oblige them to assign. See Case *Conventry* and *Attorney Gen.* in the House of Lords, 8 May 1720.

13. *Exempt from all Ordinary Jurisdiction, and here of the Visitatorial Power.*

1. *Visitation.*

1. *Who may, and who may not.*

1. *The Ordinary may not.*

1. A Prohibition lies where the Visitatorial Right is invaded. *Gilb.* 181. *Show. Parl. Ca.* 51. 4 *Mod.* 112. *Stillingfleet's Cases* 413.

2. Visitation is a Sacred Trust in the Crown to superintend those Orders and Rules as have been given by the King, or any of his Royal Predecessors, touching their Charities, as appears by the *Register* 40, 41. And if this Right be invaded, a Prohibition lies; and this is the Privilege of every common Founder, upon the general Rule of Reason, *Cujus est dare ejus est disponere*, and this is mentioned in the Case of *Phillips* and *Bury*, *Show. Parl. Ca.* 51. 4 *Mod.* 112. and *Stillingfleet's Case* 413. and therefore the Visitatorial Power is that Jurisdiction there is no Appeal to the Law from. *Gilb.* 182. The principal Case was concerning the Visitation of *Birmingham School*, which was founded by King *Edward* the Sixth, and twenty Governors were appointed for the Government of this Charity, and they were to do such and such Acts,

Acts, by the Advice and Consent of the Bishop of the Diocese. It was indeed contended, but without Foundation, that the Governors had the Visitatorial Power, but ruled, that it was in the Crown, as Founder, and Conservator of their one Charity; and this was said to be the Case of every Charity by private Persons, by the Rule, *Cujus est dare, &c.* but it was never pretended the Bishop had any Visitatorial Power. The Precedents were said to be the same with the principal Case in *Winbourne School, Basingstoke School, Plymouth School and Bethlem Hospital, &c.* *Gilb.* 178 to 183.

3. *Un Visitor*, that is, when the King, or any of his Progenitors, is Founder of the House, there the Ordinary regularly shall not visit them; but the Chancellor of *England* is appointed by the Law to be Visitor of them, or where a special Visitor is appointed upon the Foundation, the Complaint must be made to that Visitor. *Co. Lit.* 96.

4. Whether an Hospital or College, &c. to Charities there must be a Visitor, either the Founder and his Heirs, or one appointed by them. *Skin.* 484.

5. Colleges are Lay Corporations, and were so holden in *Appleford's Case*, and not within the Jurisdiction of the Ecclesiastical Courts; their Members have no Admission or Institution from the Ordinary, and their Visitors, *quatenus* Visitors, are Lay Officers, and have their Authority derived to them by the Common Law, and not by any Commission, or Constitutions Ecclesiastical. *Skin.* 494, 495.

*Note; Colleges in the Universities are here meant.*



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6. *Mich. 3 & 4 Eliz. Coveney President del novel Coll' en Oxon deprive per le Evesque de Winton, Visitor del dit Coll' & exempt de tout Jurisdiction Ordinary, fuit Appeal al Roy en son Chancery, & Comission illonq; grant a A. Brown & Weston, Justices que sur Conference ove auter Justices & Civilians resolve que le Appeal ne gist, ne ascun auter remedie pur le Appellant, pur ceo ceste Case fuit hors del dit Stat' de 24 & 25 H. 8. car cest Depri- vation est mere temporal, & come pur le Ley prov. Ex quo sequitur que un Assize gist, &c. 4 Inst.*

7. A common Person is Founder of an Hospital which is Donative by Letters Patent, and is Temporal; if the Ordinary will visit, the Patron shall have a Prohibition, or if the Ordinary will cite any of the poor Men, or remove them, &c. the Founder, or his Heir, shall have a Prohibition. *Fitz. N. B. 42. B.*

8. Hospitals not visitable *per le Ordinary.* *Palm. 451.*

9. The Bishop of *Winchester*, Visitor of the School of *Winchester* of the Foundation of *Wickham*, late Bishop of *Winchester*, the Archbishop of *Canterbury* and others his Colleagues, *anno 5 Car.* cited the Usher of the said School by Force of their Commis- sion to appear before them, and they pro- ceeded there against him, for which they incurred the Danger of a *Premunire*, and so did the Archbishop of *Canterbury* and his Colleagues, by Force of an High Commis- sion to them directed, cite one *Humphry Franke A. M.* and School-master of *Seve- nock*, of the Foundation of Sir *William Seve- nock*,

*noek, in tempore H. 6.* to appear before the High Commissioners at *Lambeth*, which Citation was subscribed by Sir *John Bennet*, L.L.D. Dr. *James* and Dr. *Hickman*, three of the High Commissioners, and Sir *Christopher Perking* procured the said Citation to be made; and when *Franke* appeared, the Archbishop being associated with Sir *Christopher Perkins* and Dr. *Abbot*, Dean of *Winchester*, made an Order concerning the said School, (to wit) that the said *Franke* should continue in the said School until the Annunciation, and that he should have 20*l.* paid him by Sir *Ralph Bosvile*, Knight. 13 Co. 11.

**2. The Crown.**

**1. The Crown, or the Lord High Chancellor, as Visitor for the Crown.**

1. Where the Presentation belongs to the Crown, the Lord Chancellor is to present, and he is also to visit for the Crown, as he is to advise the King, according to Equity and good Conscience. *Elsm. Obs.* 26. His Lordship is called the Mouth, the Ear, and the very Heart of the King. *Elsm. Obs.* 21. He is called *Pater Patriæ*, the King is only his Superior. *Elf. Obs.* 3, 45, 6.

2. The King may have a Prohibition to the Ordinary, that he visit not the Hospitals of Royal Foundation; because the Chancellor of *England* ought to visit them, and no Body else; and so it is of the King's or his Progenitors Free Chapels, no Ordinary shall visit them, but the Lord High Chancellor. *F. N. B.* 42. A.

N 3

3. Where

3. Where the King is Founder, his Majesty and his Successors are Visitors; but where a private Person is Founder, there such private Person and his Heirs are, by Implication of Law, Visitors. *Peer Will.* 326.

### 3. *The Founder.*

#### i. *General.*

1. There are many Peculiars in the Hands of the Laity, where neither the Archbishop, or Bishop, have any Thing to do, or Power to visit. *3 Lev.* 212.

2. Founders, as they are Benefactors to the Publick, have the Power of forming and disposing of their Charities, and may fashion them as suits best with their Designs, so they give them legal Shape. *Skin.* 502.

3. It is to be presumed that a Founder, who has given largely to Charity, will keep the same to Rule and Order. *Gill.* 181.

4. Where a private Person is Founder, such private Person and his Heirs are, by Implication of Law, Visitors. *1 Peer Will.* 326.

\* 5. *Trin.* 2 *Geo.* 2. *Dr. Bentley* and *The Bishop of Ely.* Where the Founder has not given Rules to the College of his own Foundation, his Heir has that Right devolving upon him, on the Death of his Ancestor; and this Right differs from that of a Visitor by Appointment, in which Case the Law is the same whether the College was of Royal or private Foundation.



6. *Holt C. J.* It is not at the Pleasure of the Founder, whether there shall be a Visitor or not; for if he is silent during his own Time, and make no Appointment of a Visitor, the Right will descend to his Heir; and so it appears in the Case in *Telo. 65.* and *Cro. Jac. 40.* where it is admitted on all Hands, that the Founder is Visitor, and so is *8 E. 3. 70.* and *8 Aff. 29.* so that Patronage and Visitation are necessary Consequents upon one another; for this Visitation Power was not introduced by any Canons or Constitutions Ecclesiastical; it is an Appointment of Law, it ariseth from the Property which the Founder had in the Lands; and as he is Author of the Charity, the Law gives him and his Heirs a Visitation Power, that is, an Authority to inspect their Actions and regulate their Behaviour, as he pleaseth; for it is not fit that Members that are endowed, and have the Charity bestowed upon them, should be left to themselves, but pursue the Intent and Design of him who bestowed it upon them. And as the Founder and his Heirs are Patrons, they are not to be guided by the common known Laws and Rules of the Kingdom, but by the particular Laws and Constitutions assigned them by the Founder or Patron. *Skin. 483, 484.*

7. Where a common Person is Founder of an Hospital, which is Donative by his Letters Patent, &c. if the Ordinary will visit, the Patron shall have a Prohibition against him, or if the Ordinary will cite any of the poor Men to appear before him for an Hospital Cause, or to remove him,

the Founder, or his Heirs, shall have a Prohibition. *F. N. B. 42. B.* And quære, if the Patron may not, as I conceive he may, prosecute the Ordinary on the Statute of Provisors, as I conceive appears from many Authorities.

## 2. His Authority.

1. Citation, Monition, Visitation, and administering the Oath, are Acts not to be done as a private Person, but only as Visitor. *Skin. 474.*

2. Visitor may adjourn the Visitation. *Skin. 474.*

3. Where there is a Visitor, the Court intends that the Visitor will do Right. *Skin. 454.*

4. Lord Keeper: Where once a Visitor hath given Judgment, no Court can meddle in it. *Skin. 646, 647. in Canc.*

5. Holt Lord C. J. I take it to be clear, that where any one is Visitor of a College, he has full and ample Power to deprive and amove any Member of the College, quatenus Visitor. *Skin. 479.*

6. Holt Lord C. J. The Question is not, what was reasonable or fit for the Founder to do, but what he has done; it is not in our Power to control for our imagined Unreasonableness; for he had such an Authority and Interest himself in what was of his own Creation, as that he might invest the Person he appoints Visitor with any Power he pleased to give him; and it is to be supposed that what he hath done, he had Reason for doing, though if he had not, it is not material, his Will is his Reason in disposing

posing and ordering his own; and it is not in our Power to take away this Authority from him, because we think it unreasonable. Who knows what Reason a Man may have? Every Man is Master of his own Charity to appoint and qualify it as he pleases. *Skin.* 481.

7. *Holt* Lord Ch. J. In our old Books, deprived by Patron, and deprived by Visitor, are all one; for it is a Benefit which naturally springs out of the Foundation, and it is in his, the Founder's, or Patron's, Power to transfer it, if he so please, to another; and when he hath so done, the other will have the same Right and Authority as the Founder himself had. *Skin.* 484.

8. *Holt* Lord C. J. The Sufficiency of the Sentence of a Visitor (*and in the principal Case, it was a Visitor by Appointment only*) is never to be called in Question, nor any Inquiry to be made here (*in B. R.*) into the Reasons or Causes of the Deprivations, if the Sentences be given by him who is the proper Visitor created so by the Founder or by the Law, you shall never inquire into the Validity or Ground of the Sentence; and this will appear if we consider the Reason of a Visitor, how he comes to be supported by Authority in that Office. *Skin.* 482.

9. A Visitor (*by Appointment*) is to judge according to the Statutes and Rules of the College, &c. he may expel, and, as it is in 8 *Aff.* 29, 30. he may deprive. The only Question there was, who was Visitor; for it was agreed on all Hands, that, *quatenus* Visitor, he might deprive. If he be a Visitor,



Note the Difference.

tor, as Ordinary, there lieth an Appeal from his Deprivation; but if, as Patron, there is none: That Deprivation, whether by Right, or by Wrong, was to stand good. *Skin.* 484, 485.

10. *Holt C. J.* Where there is a Visitor, and he hath Power to proceed to a Deprivation, you (*the King's Bench*) shall not examine his Proceedings more than those of any Judge; and his Lordship said, he remembered, that my Lord *Hale* mentioned and took it for clear Law, that it was as binding as a Judgment in an Assise to bind the Plaintiff; he is made Judge, and his Person particularly designed by the Founder; but he hath his Authority from the Law, and he is to judge by the Statute, &c. The Founder hath trusted this particular Matter to his Discretion, and why should we suspect him that he will not do right, &c. *Skin.* 489, 492, 493.

\* 11. Visitors are not tied up to any particular Forms, are not to be prohibited for Irregularity or Informalities in their Proceedings, or Acts, but only for want of Jurisdiction. See *Bishop of Ely* and *Dr. Bentley's Case* in the House of Lords, 6 May 1732. See 1 *Mod.* 12, 84. 3 *Lev.* 211. *Gillb.* 181, 178, 182. *Skin.* 474, 498, 646. 3 *Mod.* 295. 4 *Mod.* 106, 112, 236, 238, 240, 241. 5 *Mod.* 404, 452. 1 *Show.* 74.

\* 12. A Visitor in his Citation, &c. need not call himself so, as the Parties to be visited are presumed to know their Visitor. See the *Bishop of Ely* and *Dr. Bentley's Case*, before the House of Lords, 6 May 1732. *Vue tout le Case*, excellent Matter.

13. He

13. He who may visit, may deprive, as well as censure; these being but several Degrees of Punishment; for allowing his Power to visit, all is admitted. *Watson, Bishop of St. David's Case in Salk.*

14. Allowing one Power to visit, all is admitted; for he who may visit, may deprive, as well as censure; these being but several Degrees of Punishment. By the 26 H. 8. and 1 Eliz. c. 1. the only Power given to the Ecclesiastical Commissioners was to visit, without one Word of Deprivation, yet they were always allowed a Power to deprive. *Watson, Bishop of St. David's Case in Salk.*

## 4. Visitor by Designation, or Appointment.

### 1. General.

1. Though this Visitatorial Power results to the Founder and his Heirs, yet the Founder may vest or substitute such Visitatorial Right in any other Person or his Heirs. *Peer Will. 326.*

2. The Founder hath his Authority not by the Canons Ecclesiastical, but by the Common Law; and this Law it is that allows him to delegate his Authority, and constitute another Visitor, as the Bishop of *Exeter* is in the principal Case; but still the Authority of such Visitor is wholly Temporal and not Ecclesiastical, and the Power of constituting him is allowed the Founder by the Common Law, and ariseth from a Temporal Right, and the Visitor is a Temporal and not an Ecclesiastical Judge. *Skin. 495. And as he owes no Obedience to the Ordinary,*

dinary or other inferior Jurisdictions, so he knows no other to govern and guide him in his Visitation than the Law of his own Conscience, ruled by the Law of holy Scripture and the superior Temporal Laws.

3. The Authority of the Founder to visit is an Authority by the Common Law, like that of an Escheator, or the like, whereof the Courts of Law will judicially take Notice; but the Authority of the Visitor constituted by the Founder is not so, it is a derivative Authority and limited, and therefore not general. *Skin. 497.*

4. *Ju. S. Eyre.* The Visitor hath no greater Authority or Power than the Founder hath given him; he is the Founder's Creature, *quatenus* Visitor, and receiveth his Being, Power, and Authority from him; and if the Founder giveth him Authority in some Things and Cases, and not in others, and qualifies and limits that Power, which he gives him, the Visitor cannot exceed that Power and Authority which is given him, *qui potest dare potest disponere.* *Skin. 454.*

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5. *B. R. Hil. 2 Geo. 2.* *Dr. Snape* and the Bishop of *Lincoln.* On Demurrer in Prohibition the Case was, that one *Dale*, a Fellow of King's College in *Cambridge* had made a Speech, upon a Publick Occasion, in the Hall of the College, wherein he reflected upon the Provost and Fellows; for which they put him out of Commons, and ordered him to retire to his Chamber; whereupon he sent them Word that he would appeal to the Visitor, and to that End, ask'd Leave to go out of the College, but not obtaining it, went without, and appaled to the Bishop of *Lincoln*;



coln; whereupon the College expelled him; from which Sentence he appealed again; and the Bishop came into the College, and visited them upon this Appeal, and whether he had a Right so to do was the present Question? Mr. Reeves, for the Plaintiff, laid it down, that in all Temporal Foundations, the Founder and his Heirs are Visitors by Law, unless another Person is particularly thereunto appointed: He said too, that either this Visitation Authority might be distributed into different Hands, or one Person may be appointed partial Visitor, and the remaining Part of this Power may continue in the Hands of the Founder and his Heirs, and this, he said, was the present Case; for King Henry 6. who founded this College, thought proper to intrust the Bishop with the Exercise of this Authority only in particular Instances, but the remaining Part of it he either kept to himself, or would not have exercised at all for the Sake of the Repose and Quiet of the Body; and this, he said, appeared from the Statute appointing the Visitor which gives them such and such particular Powers, and said, that the giving the Bishop some particular Powers in the last Clause was a Circumscribing the general Jurisdiction, which he might have seemed to have given him before, else this Clause would be without any Effect. But what, he said, fully determined this Matter was, that there comes afterwards a Clause which has negative Words in it, and says expressly, that this Visitor shall have no further Power than has been particularly given him; however he said, if he should admit that the Bishop

shop had a general Authority of examining into all Matters relating to the State of the College, when he came in his Triennial Visitation; yet there was no Pretence to say, he could come in upon a particular Appeal of a private Fellow, and that for that the Statute restrains him from coming at any other Time than his general Visitation, unless called in by the Provost and Burfers. Besides, he said, the Statutes appoint that every Fellow and Scholar shall take an Oath not to appeal in any Case; for the Words are, that they shall obey the Orders of the Provost and Fellows, *absque Appellatione aut Querelæ obstaculo quocunque*; but the Attorney General, on the other Side, said, that as to the Extent of the Bishop's Authority, he thought it clear, that it was general and universal, for the instancing in some particular principal Part of the Authority could never take away the rest of it, which was given by the general Words; he said it was a common Way of penning almost all Statutes of this Nature, and he said this Point is settled in the Case of *Phillips and Burry*. 4 *Mod.* As to the Negative Clause, that did confine the Bishop to the Place in which he should exercise his Jurisdiction, and to the Time in which he should make his general Visitation; but was far from tying him up to the Instances particularly mentioned: Then as to the Bishop's coming in upon a particular Appeal of a private Fellow, he said, it was determined in the Case just before cited, that tho' a Time is stated by the Statute for the Visitor's Exercising his general Jurisdiction; yet as incident to his Office, he

he may *de jure*, at any Time, make a particular Visitation, on a private Appeal, and examine into the Matters he was requested to inquire into, unless there is an express prohibitory Clause to the contrary; but that, he said, was not in the present Case; for at the most, the Clause which the other Side relied on is but doubtful and obscure, the Words being no ways proper to signify a restraining of an Authority at that Time given; but to take away an Authority that was given, or might be thought to be given before. Now as to that, the Attorney said, it appears by another of these Statutes, that King *Henry 6.* had obtained a Bull from the Pope to take away the Ordinary Jurisdiction from the Bishop of *Ely* over the Members of this College, and to give it to the Bishop of *Lincoln*, by which Act it was something doubtful, at the Time of making these Statutes, whether the Bishop of *Lincoln* had not a Power of visiting this College, as Ordinary, and said, there are several Opinions scattered in the old Books which favour this Notion; tho' now the Law is settled to the contrary. Then the Design of this Clause possibly might be to take away from the Bishop all Colour of Visiting upon that Account: Upon which, Mr. Attorney said, he would now consider the Force of the Oath, the Form whereof is not in general Terms, as stated on the other Side; but only the Party swears he will not appeal when he shall be punished *propter sua delicta secundum Exigentiam Statutorum*: Now who is the proper Person to judge of the Deservedness of this Punishment, but the Visitor? and as



to the Word, *Appeal*, which was relied on by Mr. Reeves, the Attorney General said, it might be understood of the foreign Appeals to Courts Temporal or Ecclesiastical, and not to this Statutable Visitor, who was appointed to redress all Grievances of this Nature; and to this Purpose cited Dr. *Terbury's Case*, 1 *Keb.* 166. and *Appleford's Case*, *Mod.* 82. Whereupon he moved for a Consultation, but the Court said, this was a Case of a good deal of Consequence and Difficulty; so they would not deliver their Opinions that present *Mich. Term*, 2 *Geo.* 2. but that the same should stand over for the Opinion of the Court till next Term, when (to wit) *Hil.* 2 *Geo.* 2. the Lord Ch. Just. delivered the Opinion and Resolution of the Court, and said, the principal Matter they relied upon was the same with that in *Philips* and *Berry*, 1 *Mod.* That wherever a general Visitor is appointed, and his Time for visiting is prescribed to particular stated Times, the Court will always construe that to be understood of his visiting *ex Officio*, and not to hinder his coming in at other Times upon a private Appeal, unless there are direct negative Words to that Effect; for if it was not for such a Construction, the Body would be left without any Redress in the mean Time. His Lordship also said, that the Reason of that Resolution warranted them in another they also made, that wherever a Visitor is appointed only to particular Purposes, and his Time of Visiting confined in this Manner, they will always construe it with the Distinction mentioned. His Lordship also observed, that here in the present

present Case, the Bishop is general Visitor; for the Words in the Recital in the Statute of Visitation make him such, and the Conclusion reckons up all the Instances which it can be supposed there may be Occasion of for exercising this Authority; but tho' it had not, his Lordship said, they were of Opinion, a certain Number of particular Instances would not have circumscribed the general Jurisdiction before given; and his Lordship also said, he thought a proper Rule might be applied, that where particular Words are in the same Sentence which the general Words are in, they may be construed to abridge the Sense of them; but where they are in distant and other Clauses, the second shall only be construed as a loose Enumeration, and more especially so in ancient Writings, where perhaps so much Accuracy was not observed as now. Then as to the negative Words so much insisted on, they were of Opinion they did not at all refer to this Right, which is now claimed as Visitor; for the Words are, *quoad alia*, than what is mentioned as Visitor; but they thought they might well refer to the general Notion which was at that Time received of his visiting as Ordinary. Then his Lordship was pleased to answer some of the main Objections, and the first he took Notice of was, the Provost being Visitor himself as to some particular Matters; but that, his Lordship observed, could not be, for the Bishop has undoubtedly a Right of controuling what the Provost has done when he comes in upon a general Visitation; and all Visitors are necessarily in the very Notion of the Words *final Judges*.

Then to the Objection about the Oath, his Lordship said, that it was determined that would not bind the Party in *Appleford's* Case, and in *Coleworth's* Case cited in the Case of *Philips* and *Bury*; but besides, in the present Case, the Oath is far from being general; for it is, that he will not appeal when he shall be punished *secundum exigentiam statutorum*; however this is one good Effect that this Oath may have, that if the Appeal be found unjust, it will be good Cause of Expulsion; for these Reasons his Lordship said, they were resolved, that a Consultation should be awarded: Upon which Mr. *Harding*, Counsel for the Bishop, said, he did not know but it might be proper to move for Costs; but the Court inclined, that they could not give Costs but where some Act of Parliament has allowed them; whereupon Mr. *Strange* said, that the Statute of King *William* does give Costs on Demurrer in Prohibition; upon which the Court held, that if so, they had a Right to them, without making this Application.

## 2. How appointed.

*Trin. 2 Geo. 2. B. R.* Dr. *Bently* and Lord *Bishop of Ely*. The Court said, they were very clear of Opinion, that the Words *Episcopus Eliensis Visitator sit*, extended to the Bishop's Successors for ever; and therefore they would not consider that Point any further.



*5. The Acts of the Visitors.*

*1. Whether may be enforced by the Authority of the Temporal Courts.*

*1. In B. R. Trin. 2 Geo. 2. The Archbishop of Canterbury and The Master, Fellows and Scholars of Trinity College Cambridge.*

Mr. Lee, now Lord C. J. moved for Time till next Term, to shew Cause on a Rule which had been made for a *Mandamus* to be directed to this College, to admit a Librarian upon the Appointment of the Archbishop, he having this Power given him by the Statutes of the College; he said, there would be a good deal of Time necessary to the looking into several of these Statutes to see whether the Archbishop had such a Power or not; and that the College was not served with the Rule till *Friday* last. The Court said, if this had been a Motion for Time to make a Return to a *Mandamus*, the Suggestion of Difficulty might have been very proper; but five Days Time was enough to shew Cause, whether the *Mandamus* should not go; they also said, there can be no Prejudice to you by the going of the *Mandamus*; for if the Archbishop has not this Right, you will not be in Contempt by refusing to obey it; but there may be a Prejudice to the other Side; for if the Archbishop has this Right, the Librarian ought to be admitted immediately, and receive the Profit of his Office, which, if he is not admitted to now, he will have no Remedy for.

## Jura Ecclesiastica.

2. Pas. 8 Geo. 2. B. R. *The King and Walker.*

Mr. Serjeant *Eyre* moved for a *Mandamus* to be directed to Dr. *Walker*, Vice-Master of *Trinity College* in *Cambridge*, to put in Execution a Sentence of Deprivation against the Master, which the Bishop of *Ely*, as Visitor over the Master, had pronounced. My Lord Chief Justice, on this first Application, said, that he thought the proper Application would be to the general Visitor; however a Rule was made to shew Cause. The Return of this *Mandamus* coming now to be argued, (*Hill. 9 Geo. 2.*) Mr. *Wynn* now Serjeant said, that the Writ set forth, that King *Henry 8.* by his Letters Patent in the 19th Year of his Reign founded this College, and that King *E. 6. anno 7.* gave certain Statutes to this College, by which it was provided, that the Bishop of *Ely*, for the Time being, should be general Visitor over the Master and the Rest of the College; that Queen *Elizabeth* by her Letters Patent *anno 2.* gave them other Statutes, by which it was provided, that in Case the Master should be convicted of Dilapidations, he should be deprived by the Bishop, and that the Vice-Master, for the Time being, should execute the Bishop's Sentence upon him. The Writ suggested, that the Bishop of *Ely* visited the Master, and deprived him for Dilapidations; that this Sentence had been certified to the Vice-Master; that he had been required to execute it, and had refused so to do; whereupon the Writ was commanding the Vice-Master, that he should execute the Sentence; whereto he returned, that the Statutes of *E. 6.* were cancelled

cancelled by the College accepting those from Queen *Elizabeth*; that by the Statutes of *Eliz.* the Bishop of *Ely* was appointed Visitor over the Master only, and that the Right of Visitation was in the present King only. Upon this State of the Case, Mr. *Wynn* said, that he should not offer any Thing to the Court, whether the Bishop of *Ely* was general Visitor over the College or not; but submitted it, that notwithstanding it should be allowed, that the Bishop was Visitor over the Master only, that still the *Mandamus* ought to go; for which Purpose, he said, he should consider two Questions. 1. Whether this Court had no Power to compel the Vice-Master to execute his Duty, though the King might compel him likewise. And 2dly, As this Case really is, whether the King hath any Power to compel him at all. With Regard to the first, he submitted it, that it was the Business of this Court to correct and assist all inferior ones. *Term. Hill.* of the late King, a *Mandamus* was granted to the Quarter-Sessions to give Judgment to abate a Nuisance; the like was done *Mich.* 11 of the same Reign, to the Court of *Sandwich*, in the Case of *Bayly* and *Born*. *Mich.* 7. same King, a *Mandamus* went to the Sheriffs of *London*, to command them to give Judgment on a Writ of Inquiry: The like in the Case of *The King* and *The Bailiffs* of *Andover*, *Term. Trin. anno 2.* of the present King; and the *Mich.* following a *Mandamus* went to the Mayor of *Liverpoole*, to require him to hold a corporated Assembly to renew Leases; and in *Style 9.* it appears, that an Adjudgment removed from the Cinque Ports



into this Court by *Certiorari*, a *Sci. fa.* issued from this Court to execute it; so in the Case *Powis* and *Andrews*, Feb. 1723. before Lord Chancellor. (*before the House of Lords*, 11 March 1727.) On Suit in the Ecclesiastical Court, the Judge had ordered an Executor to bring Money into Court; that Sentence, on Appeal to the Delegates, was reversed; for that the Ecclesiastical Court had no such Authority; but on Demurrer to a Bill in Chancery, for that Purpose brought, my Lord Chancellor ordered the Executor to bring the Money into Court. By these Cases he submitted it, that it sufficiently appeared that this Court, as well as others, do often aid and assist one another; and for that Purpose he cited *Palm.* 50. *2 Rol. Ab.* 106. *Lev.* 119. *Fitz. N. B.* 34, 538. *Vent.* 32. and *Rol. Abr.* 530. pl. 12. And he further said, that the Court had granted *Mandamus's* even in the Case of this very University, as a *Mandamus* went hence to this University to elect a *Regius Professor*; and another, in the late Reign, to restore Dr. *Bentley* to his Degrees; yet the King is considered as Visitor of both Universities; and he said, to come nearer to the present Case, *Term. Trin. anno 12* of the late Queen, a Rule to shew Cause was obtained on (late Judge) *Page's* Motion, why a *Mandamus* should not be directed to the late Bishop of *Ely*, requiring him to proceed to Judgment on the like Articles with the present; the Rule indeed, he said, was not made absolute, because the Bishop did proceed; and in the present Case he submitted it, there were the strongest Reasons for granting this *Mandamus*; because it is at the Request

Request of the Judge himself. With Regard to the second Question, he submitted it, that the King himself, had no Power of sentencing the Vice-Master for not executing the present Sentence: He said, it is agreed on all Hands, that the Bishop is Visitor of the Master; the King has delegated his whole Power of visiting him to the Bishop, and therefore the King can have nothing to do with the Execution or Examination of the Sentence. If this had been in the Case of a private Founder, he submitted it, the Law would have been clear in this Respect, and this being the Case of a Royal one, he apprehended, made no Difference; and for Authority cited *Fitz. 93. Skin. 484. and Hob. 105.* Mr. *Strange* argued on the other Side, and said, that with Regard to the Merits of the Question, he submitted it, that no *Mandamus* ought to be granted. In the Case *Wilkins and Mitchel, Trin. 10 King Will. in Debt for Rent in the Mayor's Court of Cambridge* the Plaintiff was nonsuited, and the Mayor refused to grant Execution for the Costs, having taking Security for his Indemnity; whereupon a *Mandamus* was moved for; but the Court refused to grant it, because a Writ *De executione judicii* lay out of Chancery; and further for Authority cited *Show. 74. Car. 92, 168.* And he said, he did not know that in any Case one Court assisted another in executing its Process; but in the present Case, he said, was less Reason for doing it than in any other; because the Vice-Master may be visited either by my Lord Chancellor, or certain Commissioners, as was determined in the Case of *Birmingham*

ham School, *Hill. 5* of the late King; and besides, in the present Case, he said, there was a flat Exception to the *Mandamus*, in Point of Form; for the very *Mandamus* sets forth that the Bishop is general Visitor by the Statute of *E. 6.* and if that be so, there can be no Colour that the Court should interpose. My Lord Chief Justice said, the general Question was, whether upon this Writ and Return there was a Foundation to grant a peremptory *Mandamus*; the general, his Lordship said, must be admitted on all Hands, that where there is a Lay Foundation, and the Visitatorial Power either in the Heir of the Founder, or of a Visitor by his Appointment, the Court cannot, by any Means, interpose. These Powers of Visiting, his Lordship said, were not so properly Jurisdictions as Decisions of the Founder himself in his own Charity; and of this Opinion his Lordship observed my Lord *Holt* seemed to be, in the Case *Phillips and Bury*; his Lordship further thought this might properly be called *Forum Domesticum*; and he said, he did not know that the Court had ever gone so far as to grant a *Mandamus* to make the Visitor execute his Sentence; tho' he would not say it would not lay. And as to the Case of *Regius Professor*, he said, it was not shewn there that the King was Visitor of the Universities; and his Lordship agreed, that in the present Case there was no Difference between this, being a Royal Foundation, from what it would have been in the Case of a private one; but he said, these Rights were nothing like Rights founded by Charter or Act of Parlia-



Parliament; but this his Lordship clearly agreed, that when the Visitor deprives a Man, he is immediately out, and the Party nominated in his Room may bring a collateral Action for the mean Profits or an Ejectment; and his Lordship also said, he did not know, there was any Instance in the Law, of this Court granting a *Mandamus* to an Officer of another Court to put in Execution their Sentences, and by this Means to act as Ministerial to them; and besides, in the present Case, his Lordship said, the *Mandamus* in itself was clearly bad; because it admits the Bishop to be general Visitor. The Rest of the Court were of the same Opinion; and accordingly agreed to consider, whether they would quash or discharge the Writ, or allow the Return.

3. Mich. 9 Geo. 2. B. R.

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Mr. Abney moved now for a *Mandamus* to the Collegiate Church of the Blessed Virgin Mary in Southwel, to restore one ——— to his Stall of Vicar in the said Church; he observed this was an antient Endowment from the Crown, and confirmed by a private Act of Parliament anno 25 H. 8. by which Act they had a new Name given them, and the other Parts of it he owned were little more than Confirmation; however he said, as there was an Act of Parliament in the Case, the King's Court were the proper Judges of its Construction; for which Reason it was not necessary to apply to the King, as Visitor, but this Court may properly interfere; and to this Purpose he cited one *Dowgate's Case*, where a *Mandamus* was to the Dean and Chapter of *Dublin*, to restore

store him *ad Staulum in Choro & Vocem in Capitulo*. So in *Dr. Sherlock's Case*, who was Master of *Catherine Hall* in *Cambridge*; in that Case was a *Mandamus* to admit him to a Prebend in *Norwich*, which was annexed to his Headship; and *Hil. 1.* of the present King, there was a *Mandamus* for the Master of *Oriel College* directed to the Dean of *Rochester*. My Lord Ch. Just. said, in the Case of *Dr. Sherlock* he well remembered, that the Foundation of that was, that the Prebend was annexed to the Office of Master by Act of Parliament; but yet he thought if this Act was meerly to be considered as an Act of Confirmation, this Court would hardly interfere; however a Rule was made to shew Cause, and after the Rule was made absolute. So that, as I conceive it, the Court was after satisfied that the said Act of Parliament was more than meerly an Act of Confirmation, and so gave this Court a Jurisdiction; else, as I apprehend, according to his Lordship's Opinion above, and the constant and uniform Opinion of the Courts, in almost innumerable Instances, this Matter must have received its Decision from the Crown, as Visitor, in Right of the Foundation's being a Royal one.

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4. *Trin. 2 Geo. 2. in B. R.* *Dr. Bentley* and Bishop of *Ely*.

*Per Cur'*: Wherever a Visitor (by Appointment, as the Bishop was) proceeds contrary to his Citation, or inflicts different Penalties from what the Statute prescribes, this Court always grants their Prohibition.

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5. *Mandamus's* have been frequent to admit Fellows of Colleges. *Dr. Bentley's Case*.

6. *What*

6. *What a good Evidence of the Visitatorial Power.*

B.R. Pas. 1726. *Cockman* con. *Mather & al.*

This was a Trial at Bar concerning the Right of Visitation of *University College Oxon.* One of the Issues in this Case was, whether King *Alfred* was Founder, and the Counsel for the Plaintiff would have given in Evidence several Historians, as to this Point: But Lord Ch. Just. declared, that such Evidence is never admitted, unless in Proof of some Point concerning the Government, the rest of the Court did not deny it, so it was waived. *Vide Skin. 15.*

7. *Whether the Visitatorial Power may be, and how, extinguished, or suspended, and the Remedy in such Cases.*

B. R. Pas. 1. Geo. 2. The King and the Bishop of *Chester.*

This was a *Mandamus* to the Bishop of *Chester*, as Warden of *Manchester College*, to swear in *Ashton*, Chaplain of the College. The Bishop, as *Warden* return'd, that this College is of Royal Foundation, and that King *Charles* the first constituted the Bishops of *Chester*, for the Time being, Visitors, and so concludes that no *Mandamus* ought to go to him, and this was the only material Part of the Return. The Court admitted, that in all these Eleemosynary Foundations, where is a Visitor by Appointment, either by the Act of Law, or Act of the Party, the Court cannot interpose, unless in those Cases where the Visitatorial



tatorial Power is either extinguished or suspended; and that this Authority was sometimes so, they said, was evident from the common Question that is always asked in these Applications in *Mandamus*, whether there is any Body that can visit: Now they said, that this Question can only be applied to Extinguishment or Suspension of this Authority; for every one of these Eleemosynary Bodies must necessarily have one who is vested with a general Power of visiting them in general Cases. And the Court said, they would then consider, whether any one had a Right of Visiting in the particular Case. The Bishop, it is clear, cannot; for he is Party, and therefore cannot be Judge; the King cannot, for he has transferred his whole Right of visiting, to the Bishop; therefore this Case must fall into the general Current of Redress, in which all other Cases do. Mr. Lee cited a Case out of a Collection of Cases in Relation to the Privileges of the Universities, which was, that by the Statutes of *All Souls College* in *Oxon*, the Arch-Bishop of *Canterbury* is the Visitor by Appointment; and these Statutes say, if the Fellows cannot agree to chuse a Master within the prescribed Time, the Right of Nomination shall devolve upon the Archbishop; the Fellows did not agree in the prescribed Time; whereupon the Archbishop nominated one to them whom they refused to admit; whereupon the Archbishop visited them, and compelled them to it, and they rested under it, which Mr. Lee (now *Chief Justice*) said, was with him an Argument that they were advised that they could have no Redress elsewhere.

where. The Court said, they were not obliged to consider how that Case was; but Lord Ch. Just. and Judge *Reynolds* said, that they did not know but there might be a Difference, upon which the Court made a Rule upon the Bishop *nisi* on *Monday* next, which at the Time they made absolute.

8. *Whether Offences against the established Statutes of a College, &c. may be, and by whom, and how pardoned.*

*Trin. 2 Geo. in B. R. Dr. Bentley and the Bishop of Ely.* \*

An Act of Grace is only a general Pardon of all such Crimes, not particularly excepted, as the King might pardon by express Words, and therefore such Crimes to be forgiven as might be punished by Indictment, and were Crimes against the State; but Statutes of Colleges are only the Rules for the Government of a private Family; and therefore Offences against those Statutes cannot be supposed to be taken into the Consideration of the Legislature in the passing the Act; and so the Court delivered their Opinions that the Act of Grace, pleaded by the Dr. could be no Bar to the Bishop's Visitation.

## VI. *Railing.*

1. **S**MITH & *al.* Church-Wardens of *Ridgewell* in *Essex*, presented to the Archdeacon that one *Pannel* was a Railer, and a Sower of Discord between Neighbours;

bours; whereupon the Archdeacon enjoined him Purgation, and the Court awarded Prohibition; for the Cause belongs to the Leet and not to them, except it were in the Church and the like. *Hob. 246, 267.*

2. If a Presentment be made by the Church-Wardens of a Parish in the Ecclesiastical Court, that *ſ. S.* a Parishioner is a Railer and a Sower of Discord in the Neighbourhood, a Prohibition lies, unless it was in the Church. *Roll. Abr. Tit. Prohib. Case 45.*

3. *Mich. 9 Geo. 2. B. R. Wilson & al v. Reynolds.*

Mr. *Dennison* moved for a Prohibition to the Defendant, as Judge of an Ecclesiastical Court in a Suit instituted by the Plaintiffs, as Church-Wardens of the Parish of *St.* in the Town of *Northampton*, against one *Wright* for Brawling and Striking in the Church-Yard. Proceedings had been to excommunicate; but he submitted it, there ought to have been in this Case a precedent Conviction at Common Law, for which Purpose he cited *Vent. 146.* and accordingly a Rule was to shew Cause; and then came Serjeant *Eyre* to shew Cause, and said, that the Case cited out of *Vent.* was a very loose one, and one Part of it was plainly mistaken; for it is said, that because the Words of the Statute are, that the Party shall be excommunicated *ipso facto*, there is no Occasion for Sentence of Excommunication. *Lee Ju.* said, that the Law most certainly was mistaken in that Respect, and my Lord Ch. Just. said, that the Note in *Vent.* was a very loose one, and accordingly the Rule was enlarged to the

next



next Term. And now *Hil. 9 Geo. 2.* this Matter coming on again, Mr. Serjeant *Eyre*, in shewing Cause against the Prohibition, said, he apprehended that the Ecclesiastical Court had an Original Jurisdiction in Matters of this Nature, for which Purpose he cited *Lat. 116*; and if this was so, he reasoned it could not be said to be taken away by *Stat. 5 & 6 E. 6. c. 4.* and for this he cited the Case of *Skreen and Cotteral, Trin. 3 Geo. 2. in Com. B.* there it appeared, a Suit had been instituted in the Ecclesiastical Court against a Quaker under such a Value as the Justice of Peace may relieve in by the *Stat. W. 3.* but on Demurrer to a Prohibition the Court held, that notwithstanding that, the Jurisdiction of the Ecclesiastical Court was not taken away, and to the same Purpose, he said, was *5 Co. Cawdrey's Case*; and by this he said, it sufficiently appeared that a Sentence of the Ecclesiastical Court was necessary; and for Authority in this Point he cited *Dy. 255. b. 3 Cro. 659 & Het. 86*; so that one Part of the Case in *Vent. 146.* cited before, which says such Sentence is not necessary, cannot be Law, and the other Part of it, which says, if it is necessary, it can only be founded on a previous Conviction in the Temporal Courts, he submitted it, likewise was not Law: Also if the present Sentence had been founded upon the *3d Sect.* in the *Stat. E. 6.* he owned the previous Conviction at Common Law might be necessary; but said, the present Sentence was founded meerly upon the *2d Sect.* for it adjudges the Party to be guilty of Striking, or laying violent Hands in the Church-Yard

on one *Wright* a Taylor; and such Act is only an Offence within the second Branch of that Statute; and tho' the Libel is for more; yet the Sentence, he said, was the only Thing to be regarded: And upon this Branch of the Statute, he said, he conceived, that a previous Conviction at Common Law would not be necessary, and for Authority on that Side, the Cases cited were *Noy* 104. 1 *Cro.* 464. 3 *Cro.* 919. 2 *L.* 188. and *Register* 40. *B.* Serjeant *Chapple* on the other Side, submitted it, that before the *Stat. E. 6.* the Ecclesiastical Court had no Jurisdiction in Matters of this Sort, unless where the Violence was committed upon a Person in holy Orders, and that by the Statute of *Circumspecte agatis*; and if this Case was so, he submitted it, that the Ecclesiastical Courts had no Authority to declare any Sentence in the present Case; the Case in *Vent.* before cited, he insisted, was a full Authority for this Purpose; he further relied upon 6 *Co.* 29; at least, he submitted it, the Sentence could only be founded upon a previous Conviction at Common Law, and this, he said likewise was warranted by the Case in *Vent.* which hath been mentioned; and further, on that Side was cited *Salk.* 555. *Godb.* 218. 2 *Cro.* 462. *Hob.* 121, 84, 246. & *Lit.* 142. My Lord Ch. Just. declared his Opinion, that the Ecclesiastical Court had no Jurisdiction in these Matters before the *Stat. E. 6.* which had been cited; but by that Statute he thought it clear, and compared this to Clauses in Acts of Parliament, which declare that in Cases of particular Offences the Party shall incur the Penalty of Felony; yet there

there must be a Judgment; therefore this Part of the Case in *Vent.* could certainly not be maintained; and as to the other Part of it, he said, the Word, which was made Use of in this Case was, Striking, by which the Reporter, perhaps, might mean Striking with a Weapon; and if so, by the 3d Branch a previous Conviction at Common Law is necessary; but the present Case must be taken to be founded upon the 2d Branch of the Statute, where a previous Conviction, he thought, was not necessary: The rest of the Court were of the same Opinion, and accordingly the Rule was discharged. *Vide Case Sloughton and Dr. Reynolds. Term. Trin. 10 Geo. 2. B. R.*

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**VII. Scandal, Slander or Defamation.**

**1. General to.**

**V**IDE 5 Co. De Ju. Reg. Eccl. 9. a. Bro. Abr. 170. 5.

**2. Incidents to.**

**T**OUCHING Defamations determinable in the Ecclesiastical Courts, it was resolved, that they ought to have these Incidents. 1st, That it concern a Matter merely Spiritual and determinable in the Ecclesiastical Court. 2dly, That it concern Matter Spiritual only; for if such Defamation touch or concern any Thing determinable



## Jura Ecclesiastica.

able at Common Law, the Ecclesiastical Judge shall not have Cognizance of it. 3dly, Tho' such Defamation be merely and only Spiritual, yet he who is defamed may not sue there for Amends or Damages; but the Suit ought only to be for the Punishment of Sin, *pro Salute Animæ*. 4 Co. 20. a. *Fitzh. N. Br.* 53 (F.)

## 3. Who may sue for.

**I**F Baron and Feme are divorced in the Ecclesiastical Court for Adultery, *a Mensa & Thoro & mutua Cohabitatione*, and after the Wife sues sole in the Ecclesiastical Court against a Stranger for Slander and Defamation, and Sentence there given for her, and Penance enjoined to the Defendant, & *expensæ Litis* assessed to the Plaintiff, and after the Husband releases all Actions, and this Suit and all belonging to it, and the Defendant pleads this Release in the Ecclesiastical Court where it is disallowed; yet no Prohibition shall be granted; for tho' the Divorce does not dissolve the Marriage, but they remain Baron and Feme; yet forasmuch as by the Course of the Ecclesiastical Law, such Wife may sue sole, without her husband, and this Suit is but to restore her to her Credit again, which was impeached by the Defendant, and the Costs of Suit are not for any Damages, but merely for the Charge of the Suit, and dependent upon it; therefore neither the Suit, nor the Costs so dependent upon it, shall be released by the Husband. *Mich. 14 Jac. Mottam & Mottam. Rel.*

*Rol. Abr. Prohibition. fo. 300, 301. Case 10.* but if such Feme, after such Divorce, sue in the Ecclesiastical Court for a Legacy given to her, and the Release of the Husband is pleaded and disallowed, a Prohibition shall be granted; for there the Legacy is originally due to the Baron and Feme, and the Suit there is for a real Interest, and therefore the Release of the Husband will discharge it. *44 Eliz. Stephens and Tott, Rol. Abr. Prohibition 301. Case 11. Vide ante in Courts of Law 7.* Where the Party is sued in Ecclesiastical Court for Acts done in the Temporal Courts, *per tot.*

## 4. Where the Words are not intelligible.

**I**F one Woman sue another for calling her Quean, a Prohibition lies; for that it is not well known what is meant by the Word, and it is but a Word of Anger. *Tr. 3 Car. B. R. Blackshaw and Stevens, per Cur. Prohibition granted. Mich. 8 Car. Yates and Glover. Prohibition granted. Rol. Abr. Prohibition, 296. Case 14.*

## 5. Where are only Words of Heat.

**1.** **I**F one Man say to another, *thou art a Son of a Whore, and thy Mother was a Bitch,* for which he sues in the Ecclesiastical Court, a Prohibition lies; for they are but Words of Anger. *Mich. 3 Car. Lowms and Sir Ar-*

*nold Herbert.* Prohibition granted. *Rol. Abr. Prohibition, 296. Case 15.*

2. If one Man say to another, *Thou art a Knave, a paultry Knave, and a pocky-fac'd Knave*, for which a Suit is in the Ecclesiastical Court, a Prohibition lieth. *Pasch. 11 Car. B. R. Packer and Moon.* Prohibition granted. *Rol. Abr. Prohibition, fo. 296. Case 19.*

3. If a Man say of another, *Thou art a Drunkard, or a drunken Fellow, or an idle Drunken Fellow*; if a Suit be in the Spiritual Court for it, a Prohibition lieth; for this is no Spiritual Slander. *Mich. 8 Car. B. R. Star and Cuckow*, a Prohibition granted; for they are Words of Heat and Passion, and not any Spiritual Defamation. *15 Car. B. R. Haynes and Poynter.* The Words were, *Thou art a Drunkard, and art drunk three Times a Week.* Prohibition granted against the Opinion of *Berkley*; but after *Mich. 15 Car.* it was moved again, and *per Cur.* a Prohibition granted; for the Court said, they might not hold Plea of a Defamation, where they had not original and direct Cognizance of the Fact of which he is accused, as they have not of Drunkenness, unless as an Offence against the Ten Commandments, as all Sins are. *Rol. Ab. Prohibition, fo. 296. Case 17.*



## 6. Where of Ecclesiastical Cognizance.

1. IF a Man say to a Woman, *Thou art a Whore, and thy Children Bastards*, for which she sues in the Spiritual Court, no Prohibition lies; for the Statute of *Eliz.* of Bastards saves the Ecclesiastical Jurisdiction. *Mich. 2 Car. B.R. Wallis and Prater.* Prohibition denied. *Rol. Abr. Prohibition, 296. Case 16.*

2. Consultation refused where the Defamation was not merely and only Spiritual, or the Party sued for Amends. *4 Co. 20. a. b.*

3. If there be a Suit in the Spiritual Court for calling a Man *Knave*, a Prohibition shall be granted; because a Knave in the antient *Saxon* Language is a Male Child. *1 Rol. Rep. 217.*

4. *H.* libelled in the Spiritual Court for calling him a *Knave*, a *Knave* and a *Knave* indeed, and Prohibition was granted; because nothing was said that could make him liable to Ecclesiastical Censure. *Salk. 548.*

5. If one say of *J. S.* *He is a Railer and Sower of Sedition among his Neighbours*, he may not sue in the Ecclesiastical Court for these Words; for that they are in no Respect Spiritual, neither tend to any Spiritual Defamation, but are merely Temporal. *Mich. 16 Jac. Pannel and Smith*, a Prohibition granted accordingly. *Rol. Abr. Prohibition, N. Case 7.*

6. If a Parson call *A.* a *Drunkard*, whereupon *A.* answereth *thou liest*; if the Parson

sue *A.* in the Ecclesiastical Court for giving him the Lie, a Prohibition lieth; for that the Cause for which he gave him the Lie was not Spiritual, but depended upon a precedent Temporal Matter. *Mich. 7 Ja. Simpson and Water, Rol. Abr. 295. Case 5.*

\* 7. *In B. R. Hill. 2 Geo. 2. Anonymus.*

A Prohibition was prayed to be directed to Commissary's Court of *Ely*, for holding Plea of these Words, *You are a Filt, and a Strumpet*; but the Court said, it has been determined, that they may hold Plea for Words of calling a Man a *Cuckold*; for giving a Man that Name is by Implication calling his Wife a *Whore*; and in the present Case they said, the Word *Strumpet* signifies a *Whore* and more, so refused the Motion. *Vide 2 Lev. 66. 1 Co. III. Salk. 207, 552, 692.*

8. What shall be said to be a Defamation Spiritual to maintain a Suit in the Ecclesiastical Court. *Vide Rol. Abr. Prohibition, N.*

7. *Where Words of Ecclesiastical Cognizance, are mixed with Words actionable at Law.*

1. **T**HOUGH the Scandal be determinable in the Spiritual Court; yet if mixed with Matter determinable at Law, no Consultation granted. *4 Co. 20. a. b.*

2. If one libels in the Ecclesiastical Court for Words proper for the Jurisdiction of that Court, and which will not, of themselves, maintain an Action at Law, yet upon

on Suggestion to the Temporal Court, on the Rest of the Words, that they will maintain an Action at Law, a Prohibition lies. *Mich. 38 & 39 Eliz. Butler and Butler, Rol. Abr. Prohibition, N. 4.*

3. If a Man say of another, *that he keeps a Bawdy-house*, and he is sued for it in the Spiritual Court, though he might have an Action at Law, yet (as Mr. Serjeant Rolle saith) as the Spiritual Law hath a concurrent Jurisdiction, and the Words are mixed, no Prohibition lieth. *Rol. Abr. Prohibition, N. Case 11, 13. tamen qu. for, as I think, as the Words are actionable at Law, Remedy is there only to be sought, if the Party will pray a Prohibition.*

4. *Hill. 10 Geo. 2. Legate and Wright.* Serjeant Wright moved for a Prohibition to the Spiritual Court of Norwich, in a Suit pending there for Defamation; the Words were, *You are an old Rogue and a Thief, and I will prove you so, and an old whoring Rogue, and a Bastard-getting old Rogue*; he agreed, the latter Words were of Spiritual Cognizance; but as the first were Temporal, a Prohibition will lie for the whole; for which Purpose he cited 2 *Inst. 493.* Rule to shew Cause. *Easter Term* following, Serj. Eyre, coming to shew Cause, submitted it, that these Words were not of a Temporal Nature sufficient to ground a Prohibition. But the Court held the contrary, and accordingly the Rule was made absolute.



8. *Where the Words are actionable at Law.*

1. **I**F one libels in the Ecclesiastical Court for Words actionable at Law *sur le Case*, a Prohibition lieth. *Hill. 14 Jac. B. R. Turnain and Thorne. Mich. 38, 39 Eliz. Butler and Bartlet, Rol. Abr. Prohibition, N. Case 3.*

2. If one having Lands by Descent sue in the Ecclesiastical Court against another for calling him *Bastard*, a Prohibition lieth; for it tendeth to a Temporal Disinheritance. *Mich. 31 Jac. B. R. per Curiam. Rol. Abr. Prohibition, 292. L. 7.*

3. If *A* sue *B*. in the Spiritual Court for saying, *that he was false or forsworn before the Judges, in that he swore that J. S. was* a Prohibition lies; for that an Action lies at Common Law for these Words. *8 Car. B. R. Robinson and Taylor, Rol. Abr. Prohibition, fo. 297. Case 21.*

4. A Prohibition was granted to Court Christian for holding Plea for calling him *Tbief, and a Breaker of Coffers*; for this is a Matter which belongs to the King's Courts. *Hill. 14 E. 2. fo. 416.*

9. *Where the Words are spoken in a Place where, by Custom, or Prescription, an Action lieth for them.*

1. **A** Prohibition was prayed to the Ecclesiastical Court, where the Libel was for these Words, *You are a Whore and ply in Moor-Fields*, and the Suggestion was, that the Words were spoken in *London*, where an Action lies for such Words, and therefore Prohibition granted; otherwise Suits might have been in the Court Christian for such Words, though not singly for the Word *Whore*, being a common Word of Brabbling; otherwise, where joined with Words which shew the Intent to defame in that Kind. 1 *Vent.* 343.

2. *Finch*, Recorder of *London*, moved for a Prohibition to the Ecclesiastical Court, upon a Suit there for Defamation, in which *Skipwith* libelled there against his Client for these Words, *Thou art a Bawd, and there were two Couple upon one Bed in thy House.* Per Cur': *Thou keepest a Bawdy-house*, are actionable here; for the Party might be indicted for it; but, *thou art a Bawd*, is a Matter Spiritual; and thereupon no Prohibition shall be granted. But he moved further, that the Party was indicted in *London* by the same Party, and this Indictment was removed to this Court (*King's Bench*); also he had brought an Action *sur le Case* now depending in this Court for the same Slander,

der, and thereupon prayed a Prohibition, & *habuit*. Palm. 379.

3. In *B. R. Hill* 1726. *Bayley & ux' v. Robins*.

A Prohibition was moved for to stay Proceedings in the Consistory Court of *London*; for that, as Counsel urged, it appeared, upon the Face of the Libel, that they had not any Jurisdiction; this being a Libel which charges the Defendant with calling the Plaintiff's Wife *Whore* in *London*. But as this was after Sentence, *Fortescue* Ju. said, a Prohibition did not lie upon the Face of the Libel, without Affidavit of the Custom of the City of *London*, in this Case, namely, that an Action lies there by Custom; for, as the Judge said, we are not obliged to take Notice of their Customs, and said, he remembered two or three Cases to this Purpose; the rest of the Court said nothing as to this Point; but did not grant the Prohibition, because moved for the last Day of Term. *Vide Salk.* 547, 548.

4. *Mich.* 8 *Geo.* 2. *Holmes & ux' v. Hart & ux'*.

This was upon a Rule to shew Cause why a Prohibition should not be granted to the Consistory Court of the Bishop of *London*. Mr. *Strange* said, that the Foundation on which the Rule was obtained was, that the Suit was for calling a Woman *Whore*, and that the Words appeared by the Libel to be spoke in *London*; but he submitted it, that the Words did not appear to be spoke there; for they are laid to be spoke in the Parish of *St. Giles's Cripplegate*, *London*, or in some other Place in the Neighbourhood



*bourhood thereof, or near thereto adjoining;* and in these Cases, where there is not a sufficient Certainty appearing upon the Libel, it is usual for the Party to make an Affidavit that the Words were spoke in *London*, and not elsewhere; and further he observed, that the Charge was only upon the Party for saying that the other had a *Bastard*, without directly calling her a *Whore*; and in these Cases the Court expects that the Word *Whore* should be particularly express'd; for which Purpose he cited 2 *Roll. Abr.* 296. and *Lutw.* 1042. My Lord Chief Justice said, he thought there was a sufficient Reason for the Court's believing that the Words were spoken in *London*; and further his Lordship said, he thought the Words were sufficient of themselves; and his Lordship further said, this Court has allowed the Ecclesiastical Courts to proceed in Suits instituted by the Wife for calling her Husband *Cuckold*, and many Cases, he said, were contrary to those which have been cited; and accordingly the Rule was made absolute for so much of the Words as were spoke in *London*.

**10. *Where the Words are not actionable at Law.***

**A** Prohibition lies to the Ecclesiastical Court for holding Plea for Words where is no Action at Law. *Mo. fo.* 607. *Vide For beating a Clerk.*

**11. *Where***

II. Where spoken by Men of Profession, as Judges, Counsel, &c.

1. IF a Man be accused to be the Father of a Bastard before Justices of Peace, and the Justices in examining of the Matter say, *that it is his Bastard*, if they are after sued for these Words in the Spiritual Court, a Prohibition lieth, because that they said it in the Administration of their Office. *Hill. 14 Ja. Cade and Windham*; and *Mich. 14 Ja.* it was affirmed again. *Roll. Abr. Prohibition*, fo. 303. *Case 1.* But otherwise it had been, if the Justices said the Words at another Time, after the Examination. *Mich. 14 Ja.* in the same Case of *Cade and Windham*, *Roll. Abr. Prohibition*, fo. 303. *Case 2.*

1. Sir Thomas Hughes of Gray's Inn prayed a Prohibition by Hendon Serjeant; because he being of Counsel with the Defendant in an Action *sur le Case*, for saying the Plaintiff had murdered three Children; whereto the Defendant pleaded Not guilty; and at the Trial Hughes, to extenuate the Damages for his Client, urged and pressed the Fact to make the Matter probable, so far as might tend to the Defamation of the Plaintiff; and because it was his Profession, and pertinent to the Good and Safety of his Client, though not directly to the Issue, a Prohibition was granted. *Hob. 328. Vide 2 Roll. Rep. 59, 293. Mo. 915. Godb. 215. Reg. 49, 51. Fi. Ley 142. 2 Sid. 152. 6 Mod. 26, 287. Dy. 79. Vide antea, at Law, 7. where*

where the Party is sued in the Ecclesiastical Courts for Acts done in the Temporal Courts.

## 12. Justification.

1. **COOKE** sued *A.* in Court Christian, for calling him *Bastard-maker*; the Defendant justified, because he was proved to be such before two Justices of Peace, according to the Statute 18 *Eliz.* which Plea the Judges in Court Christian refused; wherefore a Prohibition was awarded. 2 *Roll. Rep.* 82.

2. Prohibition to stay a Suit in Ecclesiastical Court at *Norwich* for Defamation, and calling him *Whore-master*, and saying *that he had a Bastard*; and shews, that the Defendant who sues in the Spiritual Court was sentenced for this Cause of having a Bastard, and ordered to keep the Bastard at the Sessions at *Norwich*; and notwithstanding they would examine this again in the Spiritual Court: And upon this Suggestion the Defendant demurred. And it was adjudged that the Prohibition should stand; for being sentenced to be the reputed Father by the Justices of Peace at the Sessions, which is by the Authority of the Statute Law, it cannot be now impeached in the Spiritual Court, nor elsewhere, and all are concluded to say to the contrary, until it be reversed. *Cro. Jac.* 625. Vide post, *Where scandalous Words spoken of a Clerk.*



13. *Who to hold Plea of.*

**T**HE High Commissioners may not hold Plea for scandalous Words against a Clerk, *sed de violenta manu injectum in Clericum.* Per Articulos Cleri, cap. 3. Mo. Rep. fo. 607.

VIII. *Pensions and Annuities.*

1. **B**Ecause he was sued for a Pension before the High Commissioners, who had not Jurisdiction of the Matter, though the Ecclesiastical Court had. Prohibition granted. *Mo. pl. 1306.*

2. On Annuity between Spiritual Persons by Reason of certain Churches chargeable, grounded upon the Deed of Gift of the Predecessor of one of them, though the Persons and Things out of which it issues are Spiritual; yet, because of the Deed, the Court shall not be ousted of its Jurisdiction. *Rel. Abr. Prohibition, D. 2.*

3. Prohibition by *Collier*, Vicar of *Bromble* to stay a Suit in the Spiritual Court, where the Case was, that the Church of *B.* in the Time of *H. 3.* was appropriated by the Bishop of *Sarum*, and the Vicar was then indowed, and upon that Endowment, the Bishop made an Ordinance in these Words, *Statuimus & ordinamus*, that the Vicar shall pay annually twenty Pounds *de fructibus Vicarie* to the Precentor, in the Church of *Sarum*, to the Use of the Vicars Choral within the same Church. And for this Pen-  
sion

sion a Suit being depending in the Spiritual Court, and a Prohibition thereupon brought, Consultation was now prayed; because a meer Pension sueable in the Spiritual Court. *Vide* 11 H. 4. 85. *Fitz.* — *Bro. 51. Tanfield contra*, That it is an Annuity, and that Annuity lies properly for it in the King's Courts, and in Proof thereof was cited 19 E. 3. *Jurisdiction* 28. That Annuity lies for a Pension, by Prescription; and that the *Stat. de circumspēcte agatis*, Prohibition third, is but an Ordinance, as there is said. So E. 4. 12. of an Annuity granted for Composition for Tithes, and 20 E. 3. *Annuity* 32. A Writ of Annuity was brought for such a Pension as ours is; wherefore, &c. But all the Court resolved, that the Suit was well brought in the Spiritual Court; for *Popbam* and *Fenner* said, that there would be a Difference where the Ordinary ordains such a Payment, as Judge; there the Suit shall be in Court Christian: And where the Patron and Ordinary make a Grant in Time of Vacation; for there they charge as an Interest; and *Gaudy* said, that for such a Pension Suit might be either in this, or the Spiritual Court; and that is not denied by the 20 E. 3. and so is *N. Br.* Whereupon Consultation was granted. *Cro. Eliz.* 675.

4. This was upon a Bill *in Scac.* for a Pension of Fifty-three Shillings and four Pence issuing yearly out of the Vicarage of *St. Stephen* in *Norwich*, whereof the Plaintiffs are Patrons, and the Defendants confirmed therein by the Act of Ministers, tho' there was no Vicarage House nor Glebe, nor Tithes, nor other

other Profits, but only *Easter Offerings*, Burials and Christenings; yet *per Cur.* the Vicar is liable tho' he have only casual Profits, and that a Pension by Prescription, as this is, may be sued for here, as well as in the Spiritual Court, or at the Common Law by Writ of Annuity. *Hard.* 230, 231. *Trin.* 14 *Car.* 2. The Dean and Chapter of *Norwich* and Sir *John Collins*.

5. This was upon a Bill in the Exchequer for Recovery and Payment of One hundred Pounds a Year, agreed to be paid the Plaintiff by an Order of Vestry, which Order was made by the Defendants and other Parishioners of *St. Botolph's Bishopsgate* for a yearly Lecturer in that Parish; because it appeared to the Court that all the Parties to the Order were not made Defendants, and those who were had paid their Proportions of the Salary. The Court were of Opinion, that the Plaintiff could not have a Decree in the Cause; but advised the Defendant to propound at their next Vestry the Payment of the Arrears, which the Court conceived justly due, and which it was a Disreputation to the Parish to refuse the Payment of. *Hard.* 333.

6. This was upon a Bill in the Exchequer Equity for an Annual Pension of Two Pounds ten Shillings issuing out of an Hospital granted to the Defendants, and now for divers Years in Arrear. It was held *per Cur.* that all Pensions reserved by the King, or granted to him out of Lands, are in the Nature of Rents, and triable here and liable to be extinguished by Unity of Possession; but that such as are reserved to the King, or vested



vested in him by the Act 26 H. 8. cap. 3. are of another Nature and collateral to the Land, and not lost by Unity, no more than Proxies. *Vide* Sir John Davy's Case of Proxies. *Hard.* 388. *Mich.* 16 Ca. 2. The Bishop of Ely v. Clare-Hall in Cambridge.

7. If a Person have a Pension by Prescription, he may either bring his Action at Law, or institute a Suit in Court Christian; but if he bring his Writ of Annuity at Law, he can never after sue in the Spiritual Court; because his Election is determined. *1 Mod.* 218.

See *1 Syd.* 146. *1 Keb.* 523. *Co. Lit.* 146. a. *2 Inst.* 491. *2 Cro.* 666.

8. A Suit for a Pension may be in the Ecclesiastical Court, tho' by Prescription; but if it be denied to be Time out of Mind, then a Prohibition is to go; so that the Prescription may be tried at Law, as a *Modus decimandi, mutatis mutandis*. But if a Writ of Annuity is brought at Common Law, he can never after sue in the Spiritual Court; for his Election is determined. *1 Vent.* 265.

*1 Mod.* 218. *Case Berry and Trebeswicke.* *1 Sid.* 146. *On Twisden and Windham* Justices diont, *que fuit adjudge temps Reg. Jac. que par Pension par Prescription Remedy serra solement al Common Ley; ideo quære if the Books may not be thus reconciled, that the Party, before any Remedy sought, may take his Choice, either to seek Relief at Law, or in the Spiritual Court; but if he elects Redress in the Ecclesiastical Court, they may determine in the Matter, admitting the Prescription, aliter non, as I conceive, has been determined.*

For Pensions *Vide* 5 Co. de Ju. Reg. Eccl.  
9. a.

### IX. Oblations or Offerings, &c.

1. **O**blations are Things offered to God and his Church, by pious and faithful Christians. *Terms del Ley, Oblations.*

2. Oblations (*Oblationes*) in the Common Law are thus defined, *dicuntur quæcunque piis, fidelibus, Christianis offerantur Deo & Ecclesiæ, sive res solidæ, sive mobiles sunt.* See *Spel. de Concil. To. 1. fo. 393. Anno 12 Car. 2. cap. 11. 5 Co. de Ju. Reg. Eccl. 9. a.*

3. Offerings are defined by the Canonists to be, *quæcunque a piis, fidelibus Christianis offeruntur Deo & sanctæ Ecclesiæ, &c.* Degg's Par. Coun. 352.

4. *Nemo tenetur ad illas Oblationes, nisi vel necessariæ sint ad Sustentationem Ministrorum, vel Consuetudo ad eas alicubi obliget.* Degg 353.

5. These Offerings belong properly to the Priest, or Minister of the Church, or Place where they are made. Degg 353.

*Hard. 230,  
231.*

6. There were two several Sorts of Offerings, one free and voluntary, and *ad Libitum*, the other certain and obligatory, as those for Marriages, Christenings, Churching of Women, Burials, &c. these were, *says our Author*, due to the Priest or Minister. Degg 355. *Tho' my Thoughts are, that these had their Beginning by the Incroachment of imposing Priests, &c.*

7. The

7. The *Stat. 2 E. 6.* hath enacted, that all and every Person and Persons, which by the Laws and Customs of this Realm ought to make or pay their Offerings, &c. shall from thenceforth pay them yearly to the Parson, &c. of the Parish, &c. where they dwell. Those Offerings which were voluntary are now vanished, and not comprehended within this Law; but the customary Dues, which were certain, are thereby confirmed to the Parish Priest, &c. and are only recoverable, either in the Spiritual Court, or by Action on the Statute. *Degg 355.*

**X. Obventions.**

**O**bventions, (*Obventiones*) Offerings. 2 *Inst. fo. 661.* also Rents, Revenues, properly of Spiritual Livings. *Anno 12 Ca. 2 cap. 11. 5 Co. de Ju. Reg. Eccl. 9. a.*

**XI. Mortuaries.**

1. **M**ortuary (*Mortuarium*) is a Gift left by a Man at his Death to his Parish Church in Recompence of his Personal Tithes and Offerings, not duly paid in his Life-Time. It is not properly and originally due to any Ecclesiastical Incumbent from any but those only of his own Parish, to whom he ministers Spiritual Instruction, and hath Right to their Tithe. *Blo. Law Dict. Tit. Mortuaries. Vide 5 Co. de Ju. Reg. Eccl.*

2. Mortuary is that Beast, or other moveable Chattel, which after the Death of the



## Jura Ecclesiastica.

Owner, by Custom in some Places, become due to the Parson, Vicar, or other Priest of the Parish, in Lieu or Satisfaction of Tithes or Offerings forgot, or which were not well and truly paid by the deceased. *Terms del Ley, Tit. Mortuaries.* I suppose where a Priest of good Conscience has been satisfied that the deceased has acted uprightly with him, and not defrauded him in his Dues, such Priest has honestly refused the Mortuary; because, in such Case, there is no Reason why he should have it; but on the contrary common Honesty forbids it.

3. Mortuaries are in some Places called Coarse-Presents; because, as Dr. Cowell holds, as they were due, they were used to be paid before the Coarse was buried, when it was brought to be buried. *Degg 360.*

4. Lord Coke holds Mortuaries before the *Stat. 21 H. 8.* were only due by Custom, and not by any other Law, by Reason of the Statute *de circumspecte agatis, ubi Mortuarium dare consuevit, &c. 2 Inst. 491.*

5. This Duty was only sueable in Court Christian; but now Debt lies *sur le Stat.* for tho' the Statute is only negative, that they shall not take above such Rates, and where have been accustomed; yet it implies an Affirmative, as the *Stat. 2 E. 6.* But if a Suit be instituted for a Mortuary in the Spiritual Court, Sir Simon Degg is of Opinion, no Prohibition shall go, unless they proceed contrary to the Statute. *Degg 359.* Yet I conceive the Parson may have Difficulty to prevail in the Ecclesiastical Court; for if they Sentence upon the Canon, it binds not the Laity; if on the Custom, they may not try a Custom

Custom; if on the Statute, they may not interpret a Statute; and if a Statute gives the Benefit and no Remedy given in the Statute in the Ecclesiastical Court or elsewhere, Remedy must be in the King's own Courts of Law, as I understand the Matter; ideo quære.

6. Since Stat. 21 H. 8. If Suit be in the Spiritual Court for Mortuaries, a Prohibition lieth. Dr. & Stud. fo. 175. b. for the Statute hath fixed what shall be paid for Mortuaries. Cro. Car. 238. Where, I conceive, is a very unconscionable Mortuary demanded by a Bishop of Chester, on the Death of a poor Country Priest from the poor Parson's poorer Widow, being of his best Horse or Mare, his Saddle, Bridle, Spurs, his best Gown or Cloak, his best Hat, his best upper Garment, under his Gown, his Tippet, his best Signet, or Ring, as to the Bishop de Debito consuet' fore supponitur.

## XII. Proxies, Procurations, Synodals.

1. **P**ROCURATIONS, as the Canonists define it, est *Exhibitio Sumptuum necessarior' facta Prælati, qui Dioceſes peragrando Eccleſias ſubjectas viſitant.* Dav. 1. b.

2. Proxies, or Procurations, are reſembled or likened to an Annuity *pro Conſilio* or *pro ſervitio impendendo*, if the Counſel or the Service be withdrawn, the Annuity is determined. So where a Corody is granted for certain Service to be done, Omiſſion of the Service determines the Corody, as is 20 E. 4. Dav. 1. a.

Q 3

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3. By the Canon Law, *Procuratio exhibenda est secundum qualitatem Personæ visitantis.* Dav. 2. a.

4. It was observed that Proxies had not their Original or Foundation in the primitive Church; for *St. Paul* in his Visitation of all the Churches which he had planted in *Asia* and *Europe* demanded no Proxies; but laboured with his own Hands *pur son Sustenance, ne serroit burthenfome al Eglises*; yet long after the Canon Law, which declares that Proxies are due to Bishops in their Visitations, says, that it is agreeable to the Doctrine of *St. Paul*, *ut a quibus Spiritualia recipimus eisdem Temporalia communicemus.* Inst. Juris Canon. Lib. 2. c. de Sensib. Dav. 2. b. 3. a.

5. Plaintiff, as Arch-Deacon of *London*, exhibited his Bill in the *English* Exchequer against the Defendants, as Parsons and Vicars of *London*, for certain Sums of Money due for their Proxies by Prescription, and for which now there is no Remedy by the Ecclesiastical Law; where to the Defendants demurred, as the Thing in Demand was meerly of Ecclesiastical Cognizance and determinable in the Spiritual Court, & non alibi; and if the Tithe by Prescription alters the Case, then the Plaintiff ought to have his Remedy at Law, and not in Equity; but of this the Court doubted; & adjournatur. Vide Sir *John Davies's* Reports, the Case of Proxies; and the Ch. Baron quoted out of *Linw. Lib. 3. Decret. de Procuracionibus*, that there are three Sorts of Proxies. 1. *Ratione Visitationis.* 2. *Ratione consuetudinis.* 3. *Ratione Pacti*; and his Lordship said, that Proxies



Proxies of the second and third Sort were recoverable at Law; but because the Matter in Question was doubtful, Defendants were ordered to answer, and that this Matter should be saved to them at the Hearing. *Vide Stat. 34 H. 8.* concerning the Saving of Proxies, and that they be recoverable as formerly. *Hard. 180, 181. Pas. 13 Car. 2.* Dr. *Thomas Parker Quer' v. John Seabrooke & al' Def'.*

6. In Prohibition to stay an Excommunication for Non-payment of Proxies and Procurations, the Ground of the Prohibition was, because by *Stat. 34 H. 8. 19.* all such Archbishops, Bishops, Arch-deacons, &c. as have Right or Title to claim any Pensions, Portions, Corodies, Indempnities, Synodals, or Proxies, against any Persons to whom the King had, or should grant the Lands, Tenements, &c. charged therewith, with a Clause of Discharge, &c. should sue for their Remedy and Recovery thereof in the Court of Augmentations now annexed to the Court of Exchequer, and not elsewhere, and the Lands in this Case were granted by Patent discharged, &c. *Sed non allocatur per Cur'.* Because the Act extends only where particular Estates are granted, as appears by the Words of the Act, *any Sale, Gift, Grant, or Lease for Term of Life, or Lives, or Years,* and not where the Fee is granted, as was in this Case. *Hard. 388.*

See after *Impropriation, 5 Co. De Jure Regis Eccl. 9. a.*

XIII. *Simony.*

1. **S**imony determinable in the Spiritual Court. 4 Co. 49. b. 3 Inst. 204.

2. The Spiritual Court may punish for Simony. *Watson*, Bishop of *St. David's* Case, *Salk. Rep. Vue le livre*, where that Bishop was deprived for that Offence.

3. To avoid the detestable Sin of Simony; because buying and selling of Spiritual and Ecclesiastical Functions, Offices, Promotions, Dignities, and Livings, is execrable before God; therefore the Archbishop, and all and every Bishop or Bishops, or any other Person or Persons having Authority to admit, institute, collate, install, or to confirm the Election of any Archbishop, Bishop, or other Person or Persons to any Spiritual or Ecclesiastical Function, Dignity, Promotion, Title, Office, Jurisdiction, Place, or Benefice, with Cure, or without Cure, or to any Ecclesiastical Living whatsoever; shall, before every such Admission, Institution, Collation, Installation, or Confirmation of Election, respectively administer to every Person hereafter to be admitted, instituted, collated, installed, or confirmed, in or to any Archbishoprick, Bishoprick, or other Spiritual or Ecclesiastical Function, Dignity, or Promotion, Title, Office, Jurisdiction, Place or Benefice, with Cure, or without Cure, or in or to any Ecclesiastical Living whatsoever, the Oath in the said Canon. *Can. 40.*

4 According to *Linwood*, It is Simony to take any Thing for burying, unless it be due by Custom; and a Custom to christen a Child, when he does not do it, is not good; like the Case in *Hob.* where one dies in one, and is buried in another Parish, the Parson where he died, *notwithstanding any pretended Custom*, shall not have a burial Fee. The Parson ought not to have Money for Christening when he does not do it. *Salk.* 322.

Simony. 5 Co. *De Jure Regis Eccl.* 9. a.  
Vide *May* punish their own Members.

#### XIV. Solicitation of Chastity.

THE Indictment was for Assaulting, Beating, Wounding, and Endeavouring to ravish the Wife of *B.* upon which the Party was convicted, and afterwards the Husband brought an Action of Trespas for the same Cause; and now the Party being also libelled against in the Spiritual Court for the same Fact, (*viz.*) for Soliciting her Chastity, moved for a Prohibition to the Proceedings in the Spiritual Court. And it was urged for the Jurisdiction of the Spiritual Court, that they may punish for the Solicitation, and Incontinency, and that this Suit was *pro salute animæ*, the other for Fine and Damages. *Sed per Cur'*: A Prohibition was granted; for it being an Attempt and Solicitation to Incontinency, coupled with Force and Violence, it does, by Reason of the Force, which is Temporal, become a Temporal Crime *in toto*. *Salk.* 522. *Far.* 78, 79. *le mesme Case*.

Solicita-



Solicitation of Chastity. 5 Co. De Jure  
Regis Eccl. 9. q.

## XV. Fornication.

**A** Woman having a Bastard is punishable by the Statute 18 Eliz. yet Fornication, or Advowtry, is not examinable by our Law, as they are Deeds in Secret. 4 Co. 17. a.  
*Vide Hale's Hist. Law 31. 5 Co. De Jure Regis Eccl. 9. a.*

## XVI. Incest.

1. **A**LL Marriages between Cousin Germans and other collateral Cousins are lawful by the Statute 32 H. 8. c. 28. and if any such should be questioned, as incestuous in the Spiritual Courts, a Prohibition lies *sur le Stat.* Vaugh. 218. Hale's Anal. 42.

2. A Widow's Estate upon an incestuous Marriage is due to her, if she was never divorced *a Vinculo Matrimonii*; though there was Cause. Hob. 181.

*Vide 5 Co. De Jure Regis Eccl. 9. a. Etiam sub Division of Matters Matrimonial; see also Schism, what, Case 3.*

## XVII. Adultery.

**B**Y Holt C. J. If one commit Adultery, and the Husband brings Assault, this shall not hinder the Spiritual Court; for it is a Criminal Proceeding there, and no Indictment lies at Common Law for Adultery. Salk. 552. Faresl. 78, 79. *le mesme Case.* 2.  
*Vide*

*Vide Hale's Hist. Law 31. 5 Co. De* *Mar: within the*  
*Jure Regis Eccl. 9. a. Godolph. Paper: 406* *Osgood prohibited is*  
*not null till a Divorce —*

**XVIII. Divorce.**

**I**F a Man marry his Cousin *infra Gradus Maritagii*, who have Issue, and are divorced in their Lives, the Espousals are avoided, and the Issue is Bastard; *econtra*, if either die before Divorce; for the Divorce had after, shall not bastardize the Issue; for the Marriage is determined by Death before, and not by the Divorce, &c. *Litt. Bro. Case 48.*

2. But note for Law, that where Baron and Feme are divorced, where she is an Inheritor; yet mesne Acts executed shall not be reversed by the Divorce, as Waste, Receipt of Rent, &c. unless in some particular Cases. *Lit. Bro. Case 175. Vide 5 Co. De Jure Regis Eccl. 9. a.*

**XIX. Perjury.**

1. **3 H. 2.** **I**T is ordained, that it shall not be lawful for the Bishop to punish any one for Perjury, or Breach of Faith. *Rol. Abr. Prohibition, F. 13.*

2. If the Indictors in Felony are perjured; yet if they are sued therefore in the Spiritual Court, a Prohibition lies; for this Perjury arose upon a Temporal Cause. *13 H. 7. Kel. 39. b. Rol. Abr. Prohibition (R.) Case 8.* So if a Jury give false Verdict, *Case 9.*

3. The Ecclesiastical Courts may punish Perjury committed in their own Courts, and Matters

Matters Spiritual, as Matrimony; but not in a Temporal Contract. 3 Cro. 788.

4. The Ecclesiastical Court may punish for Perjury, in their own Courts, for a Matter Spiritual; but not for a Temporal Matter. *Watson*, Bishop of *St. David's* Case, *Salk.*

5. Perjury in Court Christian, though it be not a Court of Record is still Perjury; for which the Party may be punished at Common Law by Indictment. *Syd.* 454. *Vide* 1 *Vent.* 296. *seems contrary, tamen quære. Telv.* 72.

6. If one wage his Law untruly in an Action of Debt upon a Contract in the King's Courts, he shall not be sued for the Perjury in the Spiritual Court, and yet no Remedy lieth for the Perjury in the King's Court; for the Prohibition lieth not only where a Man is sued in the Spiritual Court for such Matter, as the Party might have Remedy in the King's Court, but also where the Spiritual Court holdeth Plea in such Case where they by the King's Prerogative, and by the antient Customs of the Realm ought not to hold any Plea. *Doct. & Stud. lib. 2. c. 24. fo. 105. b.*

\* 7. Subornation of Perjury in the Ecclesiastical Court, cognizable in the Court of King's Bench, and accordingly the Court directed, that the Parties who were complained against for Subornation of Perjury should shew Cause why an Information should not be granted against them on that Account. ——— against *Venetia Constantia Phillips*, otherwise *Dellafield*, otherwise *Muleman*.



XX. *Pro Læsione Fidei.*

1. IF one swear to me to infeoff me of Lands, if I sue him in Court Christian, he shall have a Prohibition against me, or the Judge, or both. *Statb. Prohibition.*

2. If Baron and Feme sell the Wife's Land, and she swear not to bring her *Cui in vita*, yet if after she do, and the Purchaser sue her in Court Christian on this Oath, she shall have a Prohibition. *Statb. Alr. Prohibition.*

3. If a Woman hath Right to sue a *Cui in vita*, and she make Oath that she will not sue it, and yet does, for which she is sued in Court Christian *pro Læsione Fidei*, she shall have a Prohibition; because the Oath concerned a Temporal Matter, as Land. *Fitz. N. B. 42. I.*

4. If a Man acknowledge in Court Christian that he owed another 100 Shillings to be paid to him at a Day certain, and after doth not pay it, &c. and is after sued for it in Court Christian, he shall have a Prohibition and Attachment *sur ceo*; so if he acknowledge in Court Christian that he ought to pay to such a one 100 Marks at such a Day, &c. he may not be sued in Court Christian for the Debt, and if he be, he may have Prohibition and Attachment. But if one for Matrimonial or Testamentary Cause acknowledge in Court Christian that he ought to pay 100 Marks or other Sum, at a Day certain, &c. there, if he do not pay it according to Conufance, he may be  
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sued in Court Christian for it, and no Prohibition. *Fitz. N. B. 41. B. C. D.*

5. If one acknowledge in Court Christian to pay Money at a Day, and do not pay it, so that he is excommunicated, he may have a Prohibition. *Fitz. N. B. 41. C.*

6. If one swear to me to infeoff me before such a Day, &c. and do not, yet I may not sue him in Court Christian *pro Læsione Fidei*; for that the Act to be done is Temporal and triable at Common Law; and therefore if he be sued in Court Christian, a Prohibition lies. *Fitz. N. B. 43. D.*

7. If one make Oath to pay a Debt, or make a Feoffment, or the like, and he is sued in the Spiritual Court for Breach of this Oath, a Prohibition lieth, else he should be compelled to perform his Oath, and so Lay Contracts be determined in Court Christian. *Rol. Abr. Prohibition, F. 11.*

8. For *Læsione Fidei*, upon a Promise to pay ten Pounds by such a Day, if the Spiritual Court interfere, a *Præmunire* lieth. *Lit. Bro. 11. a. Case 57.*

9. Though an Action lieth by the Canon Law *pro Læsione Fidei*, yet none lying at Law, none shall lie in the Spiritual Court in this Realm, if the Promise be of a Temporal Thing; but if they will meddle in such Matter, a Prohibition or a *Præmunire facias* lieth. *Doct. & Stud. lib. 2. c. 24 fo. 105. b.*

XXI. *Forgery.*

1. *General.*

1. **I**T was resolved, that he who sued in the Ecclesiastical Court for the Forgery of a last Will and Testament, incurred the Danger of a *Præmunire*; because the Party grieved might have had his Remedy by the Common Law. *Anno 17 H. 7.*

2. Forged Deeds or Writings are not to be ordered to be torn, or defaced, but to be kept, so that the King may proceed against the Criminal. *1 Vern. 292.*

2. *Where to be sued, and how punished, if irregularly prosecuted.*

1. **H**E who sues in the Spiritual Court for Forgery of a Will or Testament incurs a *Præmunire*; because the Party grieved might have had Remedy at Law. *3 Inst. 121.*

2. It was resolved, that he who sued in the Ecclesiastical Court for the Forgery of a Last Will and Testament incurred the Danger of a *Præmunire*; because the Party grieved might have his Remedy by the Common Law: And in the same Year 17 H. 7. Justice *Spelman* also reporteth, that one *Turbervile*, as well for the King as for himself, sued a *Præmunire* against a Person for suing for Tithes in the Ecclesiastical Court, alledging the same to be severed from the  
nine



nine Parts; and Judgment was given against the Defendant. 3 *Inst.* 121. So that, as it seems to me, where Remedy may be had at Law, a Man endangers a Præmunire for seeking Redress in the Ecclesiastical Courts, as it draws the Matter ad aliud examen, and to be discussed per aliam Legem.

## XXII. Schism.

## 1. What, &amp;c.

1. **SCHISM** is a Separation from the Unity of the Church, as Sedition is a Separation from the Unity of the Commonwealth, &c. but Schism alone is not Heresy. *Append. to Rusb. Coll. In such Case.*

2. A Man is not bound to answer upon Oath Matters concerning his Faith; for that there is a Statute by which he might be punished, if he published any false Doctrine. *Mich. 18 Ja. Jenner's Case. Rol. Abr. Prohibition, (T.) Case 5.*

3. If one convicted of Heresy, Schism, or erroneous Opinions, recant, he shall never be punished by the Ecclesiastical Law; yet in *Fuller's Case* they imprisoned and fined him 200*l.* wherefore he had a *Habeas Corpus.* 12 *Co.* 44.

*Vide 5 Co. De Jure Regis Eccl. 9. a.*

2. Where

2. *Where to be tried, and in what Cases.*

**O**F Necessity a Thing of Ecclesiastical Cognizance or Jurisdiction shall be examined in a Collateral Action, as Schism, &c. or Sufficiency of a Clerk where he is dead, &c. *Skin. 468.*

**XXIII. Heresy, or Miscreancy.**

1. **T**HE Statute made 2 H. 5. c. 7. whereby the Forfeiture of Lands in Fee Simple, and Goods and Chattels were given, in Case of Heresy, standeth repealed by Stat. 1 Eliz. c. 1. So *Belknap's* Opinion never allowed or taken for Law, because the Proceedings in such Case is meerly Spiritual *pro Salute Animæ, &c. 3 Inst. 43.*

2. A Miscreant is one who is perverted to Heresy, or a false Religion. *Bro. Presentation 54. Termes del' Ley. Tit. Miscreant. See Godb. 33. where a Bishop was deprived for Miscreancy.*

3. If one be a Miscreant his Lands were forfeitable, and the Lord shall have the Escheat; the Reason is, for that, if a Man who is out of the Faith of the King shall forfeit his Lands for the same, *a fortiori*, he who is out of the Faith of God. *Gob. 34. Bellew 194. Forfeiture.* Lord Coke differs from *Belknap*, as to the Forfeiture. *3 Inst. 43.*

4. One convicted of Heresy, if he abjure, forfeited not Goods; but if delivered into Lay Hands he did; but his Lands were not forfeited therefore till his Death. *Doct. & Stud. lib. 2. c. 29.*

5. It belongeth to the Church to determine Heresies *Doct. & Stud. lib. 2. c. 29.*

If an Heretick though he be convicted and Excommunicated repents of his Crime, he should be restored to the Church, which ought to imitate the Example of God, who Punishes the greatest of Sinners by the

6. *Sur le Stat. 2 H. 4. c. 15.* If an Heretick Convict will recant, he should be received and not punished, but if he relapsed, he was to be burnt without more ado. So the Law of God wills not the Death of a Sinner, but rather that he should repent and be saved; therefore it would be contrary both to Reason and the Law of God, not to receive an Offender upon his Repentance; or to deprive him of the Benefit of his Repentance. *Nullum iniquum in Lege præsumendum est. Hard. 64, 65. See 12 Co. 56, 57, 58.*

death of the Body, and not by Destruction of the Soul, and as soon as a Sinner repenteth of his Heresy, the Complaint ought to cease; the Cause being removed. *Father Paul's Rights of Sovereigns.*

#### XXIV. Blasphemy.

1. **B**lasphemy contains an Insult upon God, and Scandal to our Neighbour. *Father Paul's Rights of Sovereigns 306.*

2. Blasphemy is triable in Court Christian. *Ha. Anal. 98. Vide 5 Co. de Ju. Reg. Eccl. 9. a. See before Tit. Schism, what, Case 3.*



XXV. *Apostacy.*

**A** *Postata capiendo* is a Writ, directed to the Sheriff, for the taking of the Body of one, who having entered into or professed some Order of Religion, leaves his said Order, and departs from his House, and wanders in the Country; upon a Certificate of this Matter made by the Sovereign of the House to the Chancery, and praying the said Writ, he shall have it directed to the Sheriff for the taking him and delivering him to the said Sovereign of the said House, or his lawful Attorney. F. N. Br. 233. *Vue la le forme del Breve, Et sur cest il poit aver Al. Et Plar. Et un Attachment si le Vic. ne voil server le Breve.* F. N. Br. 234. A. *vne le Forme del Breve* Ditto B; and tho' the Vagrant do not change his Habit; yet if the Sovereign certify, &c. he shall have his Writ, notwithstanding the Words *spreto habitu*, &c. for they are but Words of Form, and not of Substance, &c. Ditto. C. *Vue le Reg.* fo. 71 Et 267. *But this Offence is now gone together with the regular Clergy.* See also 5 Co. de Ju. Reg. Eccl. 9. a.

XXVI. *Matters belonging to the Church.*1. *Bells.*

**S**UIT in the Spiritual Court for taking away two Bells out of the Steeple, and a Prohibition was granted; for the Church

Warden is a Corporation, and the Property is in him, and he may bring Trover at Common Law. *Salk.* 547. *Vide Comb.* 132. *Dn. Ch. Uses* 131.

## 2. Seats, or Pews.

1. **T**HE Disposal of the Seats in *Navi Ecclesiae* belongs, of common Right, to the Ordinary, &c. *Roll. Abr.* Tit. Prohibition, 288, 289. 12 Co. 104, 105.

2. *Per tout le Court de Bank le Roy*, agreed that a Seat in a Church claimed by Prescription is triable here, by *Action sur le Case*, and not in the Spiritual Court; so Prohibition was granted. *Palm.* 424. 12 Co. 104, 105.

3. Action at Law lies for a Seat in a Church by Prescription. *W. Jo.* 3, 4. 12 Co. 104, 105.

4. Resolved, if any Inhabitant and his Ancestors only have used, Time out of Mind, to repair an Isle in a Church, and to sit there with his Family to hear divine Service, and to bury there; this makes the Isle proper and peculiar to his House, and he cannot be displaced nor interrupted by the Parson, Church-Warden, or Ordinary, &c. *Cro. Jac.* 366. 12 Co. 104, 105.

5. Church-Wardens were used Time out of Mind, to dispose of the Seats in the Church, and according to such Usage, disposed to one, and the Bishop granted the same Seat to another and his Heirs, and communicated all others, who after should sit there, and a Prohibition was granted, for

for the Grant to one and his Heirs is not good; for the Seat belongeth not to the Person, but to the House; else when he goes out of the Parish he should retain the Seat, which is contrary to Reason: And there is no Reason to excommunicate all others who should sit there; for such great Punishments should not be imposed upon so small Offenders, an Excommunication being *Traditio Diabolica*. Poph. 140.

6. *Boothby*, as Executor of *Gilbert*, brought Prohibition against *Baily*, and surmised that *Sir Barnard Whetstone* was seised of the Manor of *Woodford Hall*, and that he and those, whose Estate he hath in the same, had used, Time out of Mind, to have a peculiar Pew in the Body of the Church, and that the Defendants sought in the Ecclesiastical Court to dispossess them of the same; but held, this no good Cause of Prohibition; for the Church and Church-Yard be the Soil and Freehold of the Parson, yet the Use of the Body of the Church, and the Repair and Maintenance of it is common to all the Parishioners; and for avoiding Confusion, the Distribution of Seats, and Charges of Repairs belong to the Ordinary; and therefore no Man can challenge a peculiar Seat, without a special Reason. But if it had been prescribed, that *Sir Barnard, &c.* had used, Time whereof, *&c.* and used, at their own only Costs, to maintain that Pew, and had therefore had the sole Use of it, the Prescription had stood and warranted a Prohibition, tho' the Pew was in the Body of the Church: And so it is in the like Case of an Isle, or Chapel adjoining to the Body of the



Church, upon the same Difference, whether it hath been maintained by the whole Parish, or by some particular Persons, like unto the Reasons of a Chappel of Ease. *Hob.* 69. See *Hard.* 378 same Case. *Sid.* 89, 203, 361. 2 *Lev.* 241. *Mod.* 283. 2 *Mod.* 283. 5 *Mod.* 436. 6 *Mod.* 230. *Salk.* 167. 2 *Ven.* 226. *Lutw.* 1033. 8 *H.* 7. 12. 2 *Rol. Abr.* 288. 12 *Co.* 105. *Mo.* 878. *Godb.* 200. *Poph.* 140. 2 *Bulst.* 151. 2 *Ro. Rep.* 24, 139. *Keb.* 345, 498. 2 *Keb.* 92, 342. *Try. per Pa.* 362. *Palm.* 424.

### 3. Way to Church.

1. **I**F a Suit be in the Spiritual Court, *ex Officio*, or otherwise, for an Highway to Church for the Parishioners, a Prohibition lies, upon a Surmise that it is a common Highway; for it is to be tried at Common Law, whether an Highway or not. *Rol. Abr. Tit. Prohibition, Case* 47.

2. If the Church-Wardens sue in Court Christian for an Highway to the Church, which they claim to belong to all the Parishioners by Prescription, a Prohibition shall be granted, for it is Temporal. 16 *Jac. in B. R. enter les Church-Wardens de Bitborne and Bowe.* Prohibition grant accordant. *Rol. Abr. Prohibition, fo.* 287. *Case* 48.

4. *Where Churches united, and the Parishioners are sued in the Ecclesiastical Courts to come to one Church.*

IF two Churches are united by Patron, King, and Ordinary, by the *Stat. 37 H. 8.* on Surmise that they are not above a Mile distant, and the Parishioners are sued in the Spiritual Court to come to one Church, a Prohibition lies on this Surmise. *Mich. 10 Car. B. R. inter Dobson and Sir Robert Mordant.* The Churches united were *Wellesborough* and *Waltondevel* in *Com. Warwick*; but after *Pas. 11 Ca. B. R.* the Prohibition was denied; for that there was no Suit depending against the Parishioners, nor any other Suit in the Spiritual Court to be prohibited. *Rol. Abr. Prohibition 393. Case 8. Fi. Ley.*

### 5. *Repairs of the Church.*

1. *Where to be tried.*

1. THE Conusance of the Repairs of the Body of the Church belongs to the Court Christian. *5 Co. Jefferies's Case 66. b. 67. a. b. 68. A.*

2. The Ecclesiastical Court hath Conusance of the Repairs *Navis Ecclesiæ.* *Rol. Abr. Tit. Prohib. 289, 290, &c.* as appears by *Britton*, who wrote *5 E. 1. lib. 1. c. 4.*

fo. 11. and in the Stat. *Circumspecte agatis*, &c.  
5 Co. 67. a.

\* Pas. 8 Geo. 2. B. R. *Burton and Weldon.*

This was upon a Rule to shew Cause, why a Prohibition should not go to the Consistory Court of *Litchfield* in a Suit there for a Rate for the Repairs of the Church of *Mansfield*. Mr. *Abney* said, that the Motion for a Prohibition was founded upon a supposed Custom, which the Defendant below had pleaded, setting forth that there were four Villis in *Mansfield*, namely, *Atherston*, *Mansfield*, *Hartsel*, and *Oldbury*, and that the Custom was, that *Atherston* should pay two Thirds of the whole Rate, and that the three other Villis should pay but one Third. To this Plea the Plaintiff had replied, that true it was indeed, that there was such an Usage, but that it was absolutely void; for that the Lands in the three Villis are of greater Extent, and of greater Value, on Account of Inclosures which have been made than the Lands in *Atherston*; upon which Mr. *Abney* submitted it, that the Rule ought to be discharged; he owned that where a Custom is denied, a Prohibition shall go for Want of Trial; but in the present Case, the Custom is confessed and avoided. 'Tis admitted that there is such a one, but shewed, that it is unreasonable, and therefore if this had been the Case even of a *Modus*, he submitted it that the Ecclesiastical Court should have been admitted to proceed, and the present Case, he submitted it, was much stronger; because the Suit below is for a Church Rate and the Ecclesiastical Court has a greater  
Lati-



Latitude allowed them in those Cases than in any other; and for this Purpose cited the Case *Goodfee and Foulden, Mich. 1710.* where the Suit was for a Rate for Building a new Gallery; and tho' it was doubted, whether a Gallery was not only an Ornament to the Church, yet the Suit was allowed to proceed. So in the Case of *How and Chidmore, Mich. 1.* of his present Majesty, there was a Suit for a Rate for the Church of *St. Martin in the Fields*; the Defendant pleaded, he had only a Shop in the Change, and that he was not rateable, but notwithstanding this, the Prohibition was refused; and he further cited 3 *Cro. 659.* and *Pop. 197.* Mr.

on the same Side, said, that the Custom was absolutely unequal and void, and wherever such Custom is set forth, it is the same as if no Custom had been set forth at all, for which Purpose he cited *Het. 203. Lat. 217. & Lev. 116.* My Lord Ch. Just. said, that wherever a Custom does clearly appear to be void upon the Face of it, the Court indeed will not grant a Prohibition; but in the present Case, the only Colour of its being void ariseth from an Allegation of the Plaintiff himself, that the Lands in the three Villages are of greater Value than the Lands in *Atherston*, and that too only by Inclosures; for which Reason his Lordship said, he thought that the Prohibition clearly ought to go. He said, that Questions about the Validity of a Custom belong meerly and only to the Common Law to determine as well as Questions of the Truth of them, in Point of Fact, belong to a Jury; and that, he said, was the Reason, that where a

*Modus*

*Modus* was pleaded in the Ecclesiastical Court, in a Suit for Tithes, and the *Modus* admitted, the Ecclesiastical Court can decree for the *Modus* only. The Rest of the Court were of the same Opinion; accordingly the Rule was made absolute.

2. *Who an Inhabitant to contribute thereunto.*

1. The Inhabitants of any Town may make By-Laws, without Custom, for the Repairs of the Church or Highways, &c. which are for Publick Good, and the greater Part shall bind all the Rest, and that *sans* Custom. 5 Co. 62. b.

2. Tho' he live in another Parish, yet for that he had Lands in that Parish in his Possession and Manurance, he is, in Law, *Parochianus*; for where he lies, sleeps, or eats, do not only make him a Parishioner, but also his Manurance of Lands; and therefore he is a Parishioner as to the Purpose of contributing to the Repair of the Church; for if he should not, no Body else can for those Lands he occupies; but if there was a Farmer, he only who receives Rent is not a Parishioner, because there is an Inhabitant and Parishioner who may be charged, and the Charge is upon the Person, and not upon the Land; though it is upon him in Respect of the Land, for the greater Equality and Indifference; and such Occupier might come to their Meetings, if he pleased, when they met to settle the Repairs. 5 Co. 66. b. 67. a. b. See the Register, fo. 44. b.

3. In Prohibition in B. R. held, that none shall be charged for his Land by Contribution

tribution to Church Reckonings, if he do not inhabit there, or assent to it; and a Prohibition lies, if the Ordinary cite him. See 49 E. 3. fo. — Brooke, Tit. By-Laws. Mo. 554.

4. If all the Parishioners are not rated for the Reparation of the Church, but only some, and they sued in the Ecclesiastical Court, a Prohibition shall be granted. Rol. Abr. Prohibition, 291. *I apprehend it reasonable, that every Parishioner contributing to the Repairs of the Church, or paying Church-Dues, should be seated in the Church suitable to their Rank or Degree; for that these Payments seem to me to be the Consideration of such Seats, or Pews in the Church, when such Inhabitants attend Divine Service there.*

*Vide 5 Co. De Jure Regis Eccl. 9. a.*

## 6. Ornaments of the Church.

1. *Who, and how, to be rated thereunto.*

1. IF one, not an Inhabitant, but hath Lands in the Parish, is rated for Ornaments of the Church, according to the Law, a Prohibition lieth; for the Inhabitants ought to be rated for them. Rol. Abr. Prohibition, 291.

2. If a Man be rated for the Ornaments of the Church, according to the Lands which he hath in the Parish, a Prohibition lies; for he ought to be rated according to his personal Estate. Rol. Abr. Prohibition, 291.

2. *Who,*



2. *Who, and in what Cases, bound to contribute.*

1. If the Majority of a Parish, where are four Bells, agree to have a Fifth, and have it accordingly, and they make a Rate to pay for it, it shall bind the lesser Number, though they did not agree to it; otherwise any one obstinate Person might hinder any Thing intended, and which is done for the Ornament of the Church. *Roll. Abr. Prohibition, 291.*

2. Church-wardens sue one whose Lands lie contiguous to the Church-yard, that he and all those, &c. used to repair all the Fences, &c. a Prohibition lies. *Roll. Abr. Prohibition, fo. 287. Case 52.*

3. *Pollyxfen* moved for a Prohibition, on Denial of a Custom on a Libel against a Chapel of Ease for a third Part of Repairs of the Mother-Church, which was granted. *3 Keb. 729.*

4. Prohibition to the Ecclesiastical Court of *Durham*, suggesting that they had a Parochial Chapelry within another Parish in *Northumberland*, and that the Inhabitants thereof, Time out of Mind, had a Parochial Chapel, and Divine Service, and Sacraments, &c. and were exempt from Repairs, Bells, &c. of the Parish-Church, and in Consideration that they were charged with the Repair of, and had repaired, &c. their own Chapel; notwithstanding which the Church-wardens of the Parish Church sued them for Repairs of the Parish Church and Bells, and a Prohibition was granted, and after

after a Consultation was moved for; because this Matter was pleaded and Sentence given; and cited the Case of *Chapel-Brimige*, *Hob.* 66. where a Consultation had been granted. Where to it was answered, that in the Case of *Chapel-Brimige*, Sepulture was reserved to the Parish Church, (which was not here) and it was a Reservation of antient Right; and on Examination of the Court, the Suggestion appeared untrue, and tho' it was decreed there against the Plaintiff in the Prohibition upon Plea of the Custom, yet it was to try a Matter there *dehors* their Jurisdiction; for they may not try a Custom, their Law and ours differing upon the Nature of Customs. *Lat.* 48. Custom alledged in the Ecclesiastical Court, if denied, Prohibition shall go. *Lat.* 200. A *Modus* is suable there, but if denied, a Prohibition shall go. Bounds of a Parish not triable there. 3 *Cro.* 228. adjudged; and *Het.* 133. and 3 *Bulst.* 241. Suit for a *Modus* there, and another *Modus* pleaded, Prohibition granted; the Court ruled the Prohibition to stand. 2 *Lev.* 102, 103. 2 *Rol.* 265. *Vide* 3 *Mod.* 264. 3 *Rol.* Rep. 126.

**7. Repairs and Ornaments of Churches, both.**

**1. Where to be tried.**

**I**F the Church-warden sue a Vill for Reparation of their Church, supposing the Vill to be an Hamlet within their Parish, and the Vill insists, that it is a Parish of

of it self, and not an Hamlet of the other, a Prohibition shall be granted; for now the Bounds of the Parish come in Question. *Trin. 16 Ja. B. R. enter Perry and Thomas Plaintiffs v. —* Prohibition granted. *Roll. Abr. Prohibition, 291, 292.*

2. If the Church-wardens of the Parish of *Steevenage* libel in the Ecclesiastical Court against *J. S. Farmer* of the Farm called *D.* for Contribution to the Reapirs of the Church, and alledge, that Parcel of the Farm lies in *Steevenage*, and Parcel in *Walborn*, another Parish; and alledge a Custom, that the Farmers of the said Farm have used, Time whereof, &c. to contribute to the Reparations of the Church of *Steevenage* for all the said Farm: If the Defendant say, that Parcel of the Land lies in the Parish of *Walborn*, and that he and those, &c. have used, Time whereof, &c. to contribute for it to the Church of *Walborn*, and not *Steevenage*, and deny the Prescription, it shall not be tried in the Ecclesiastical Court, but by the Common Law, and therefore a Prohibition lies; for they may not try the Custom in the Ecclesiastical Court, by which the Inheritance is to be perpetually charged; yet note, that it is but in Effect a Denial of the Prescription. *Trin. 16 Ja. B. R. The Church-wardens of Steevenage and Green, Roll. Abr. Prohibition, fo. 308. Case 20.*

\* 3. *Trin. 6 Geo. 2. in B. R. Ray and Mar-  
riford.*

The Plaintiff declared in Prohibition, that the Defendant libelled against him in the Ecclesiastical Court, as Church-warden of the Parish of *Holling cum Withringsley* in the



the County of *York*, upon a Rate for the Repairs of the Parish Church there; he set forth that the Lands, for which he was so rated contained so many Acres of Meadow, so many Acres of Pasture, and averred, that those Lands did not lie in the Parish of *Holling cum Withringsfey*, but that they lay in the Parish of *Hampton* in the said County; he also alledged the Trial of Bounds of Parishes to belong to the Temporal Courts, and not to the Ecclesiastical, and thereupon prayed the Prohibition might stand. The Defendant for Consultation pleaded, that true it is, that the Lands mentioned in the Declaration did lie in the Parish of *Hampton*; but agreed that the Plaintiff occupied other Lands, which lay in the Parish of *Holling cum Withringsfey*, and set forth, that the Plaintiff was actually rated for such other Lands lying in the Parish of *Holling cum Withringsfey*, and not for those lying in *Hampton* aforesaid. To this Plea the Plaintiff demurred, and shewed especially for Cause, that the Defendant had shewed for Cause Matter not traversable. Mr. *Robinson* argued in Maintenance of the Demurrer, and said, he did agree, that the Plaintiff had alledged in his Declaration, that the Lands, for which he was rated, lay in the Parish of *Hampton*; but the alledging that they lay in *Hampton* was merely Matter of Form, in whatsoever other Parish they lay, so that they did not lie in the Parish of *Holling cum Withringsfey*, it was the same Thing to the Plaintiff; and therefore the Traverse was bad; for it is confining the Plaintiff to prove that they lay in this particular Parish

Parish of *Hampton*. He said, the Defendant ought only have pleaded, that the Plaintiff occupied other Lands in the Parish of *Holling cum Withringsley*, for which he was rated, and there he ought to have rested; and then the Traverse, that he had other Lands in the Parish of *Holling cum Withringsley*, would naturally have come on in the Replication, which was the material Point to be put in Issue. To this Purpose he cited *Saund. 206. Syd. 227, 405. Lev. 43, 263. Plow. 95. & Carth. 116*. Mr. *Agar* argued, on the other Side; but *Page* and *Lee*, Justices, inclined to be of Opinion that the Traverse was bad; however this Matter stood over. *Probyn J.* absent.

### 8. *Arms, Monuments and Grave-stones.*

1. **I**F a Nobleman, Knight, Esquire, &c. be buried in a Church, and have his Coat, Armour, and Pennions, with his Arms, and such other Ensigns of Honour, as belong to his Degree or Order set up in the Church; or if a Grave-stone be laid, or made, &c. for a Monument of him; though the Freehold of the Church be in the Parson, and that these are annexed to the Freehold, yet cannot the Parson, or any, take them, or deface them; but he is liable to an Action by the Heir and his Heirs, in Honour and Memory of whose Ancestor they were set up: And some hold, that the Wife, or Executors who first set them up may have an Action against those who deface them, in their

their Time. *Co. Litt.* 18. *b.* 3 *Inst.* 202. 12 *Co.* 105. *Mo.* 878. *Godb.* 200, 279. *Roll.* Rep. 57. *Lamb.* 496. *Noy* 104.

2. Coats of Arms placed in any Window, or Monument in the Church, or Church-yard, cannot be beaten down, or defaced by the Parson, Church-warden, or Ordinary, or any other; and if they be, the Heir by Descent interested in the Coat, may have an Action upon the Case; for the Heir is inheritable to the Arms, as to Heir-looms. *Cro. Jac.* 366. *Sid.* 206. *Salk.* 347. *Roll. Abr.* 625. 12 *Co.* 104, 105.

**XXVII. Poor's Rates.**

1. **M**ICH. 4 *Geo.* 2. in *B. R.* *Anonymus.* \*  
A Prohibition was moved for to the Consistory Court of *York* to stay Proceedings there, in a Suit upon a Poor's Rate, upon a Suggestion, that the Party's Lands did not lie in that Parish where the Rate was made, which Matter they had pleaded below; but still the Court below was proceeding, and by this Means would try the Bounds of Parishes. The Court said, the Party ought not only have pleaded that the Lands did not lie within the Parish, but also that they lay within some other; for *Non constat* upon this Plea, that the Party has any Lands; and if so, this would be Matter proper for Appeal: However, as the Counsel said, the Truth of the Fact was, that the Lands lay in the next adjoining Parish. Rule to shew Cause; but *Hill.* following the Rule was discharged; for that he had not  
Vol. II. S pleaded



pleaded that he had not Lands in this Parish which the Libel had charged, his Plea was only, that he had no Lands in this Parish rated at this Rate, which was far from alledging, that he had no Lands at all in this Parish; but is rather a Confession that he had, and is only a Denial of their being set at this particular Rate.

\* 2. *Pas. 5 Geo. 2. B. R. Hall and Godley.*

This was upon a Rule to shew Cause why a Prohibition should not go to the Ecclesiastical Court. Mr. *Fazakerly* urged, that the Suggestion set forth, the Plaintiff below had libelled upon a Rate, whereby the Inhabitants, who lived in the Parish *anno 1799*, are required to pay a certain Pound Rate towards the Building of the Church finished *anno 1716*. He said, the Suggestion further set forth, that a Suit was in the Exchequer by the Workmen against some of the Inhabitants, wherein there was a Decree against such Inhabitants, and that the Rate further was, that the other Inhabitants should contribute to the Expence of that Suit, and upon that Part of the Rate they libel. Upon each of these Parts of the Libel, he submitted it, that the Ecclesiastical Court had Jurisdiction; but the Court were of a contrary Opinion; and so the Rule was made absolute.

## XXVIII. *Parish Offices.*

### 1. *Who privileged from serving.*

1. **T**HE King's Officers are privileged from serving Parish Offices, tho' they trade besides. 2 *Rep. Ch.* 196, 197. 1 *Vol.* 86, 140, 189, 278, &c. 2. *Stamp*

2. *Stamp*, a Clerk of the King's Bench, was elected a Church-warden *de Kingston*, and had a Writ of Privilege to the Ecclesiastical Court, that they should not swear him, and for that they obeyed not the Writ, a Prohibition went. *Palm. 292.*

3. If a Clerk of his Majesty's Court of King's Bench, or any of the other Courts of *Westminster*, be appointed Church-warden, a Prohibition lieth. *Palm. 292.*

**XXIX. Bounds of Parishes.**

1. *These Courts may not try.*

**I**F a Suit be in the Spiritual Court to try the Bounds of a Parish, a Prohibition shall be granted; for they cannot try it. 14 *Ja. B. R. Fisher and Chamberlayne. Re- solved Hill. 41 Eliz. B. R. between Piper and Barnaby*, and a Prohibition was granted. *Hill. 13 Ja. B. R. between Foster and Hide* adjudged. *Rol. Abr. 291. Prohibition.*

2. If the Vicar of a Parish libel against another to avoid his Institution to a Church, which he supposeth to be a Chapel of Ease belonging to his Vicarage; if the Defendant suggest it to be a Parish Church of itself, and not a Chapel of Ease, a Prohibition shall be granted; for they may not try the Bounds of a Parish. *Mich. 4 Ja. B. R. Fisher and Chamberlene*, for the Church of *Oakely and Clapham*; and yet there it was called *subdolè libellando. Trin. 31 Ja. Les Gardens de St. Sampson's Case in Cornubia. Pas. 9 Ja. B. R. enter Elie, Vicar de Alder- burne en Com. Wilts*, and *Cooke*, a Prohibition

tion granted. *Rol. Ab. Prohibition*, fo. 291. L. Case 2, 3.

3. If the Suit be in the Spiritual Court by a Viscount to avoid an Institution of another, who is instituted to *A.* his Chapel of Ease, as he pretends; if the other suggests that *A.* is a Parish Church by itself, a Prohibition shall be granted to try, whether it be a Parish by it self; because they may not try the Bounds of a Parish; but not for the Institution, because that appertains to them to examine whether good or not. *Mich. 14 Jac. Fish and Chamberlayne*; but *Haughton* said, that they might not try Institution, without trying the Bounds of the Parish. *Rol. Abr. Prohibition*, fo. 314, 315. (E.) Case 2.

4. If a Suit be in the Spiritual Court for Tithes, where the Question is, whether the Lands out of which, &c. be within the Parish or out of it within the King's Forest, even after Sentence for the Plaintiff and an Appeal for the Defendant, a Prohibition shall be granted; because it is all utterly out of their Jurisdiction to try the Bounds of a Parish; and also it concerneth the King; for if it be within the Forest of the King, he shall have the Tithe, & *nullum tempus occurrat Regi*. Vide *Hill. 9 Car. Rol. Ab. Prohibition*, M. Case 1, 2.



## B.

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I. *Laying violent Hands on a Clerk.*1. *General.*

1. **I**F one sue a Priest, or Monk, or Canon, or Clerk, in the Temporal Law, in Debt, or Trespass, and cause him to be arrested by his Person, if the Plaintiff at Law be for this Cause cited in the Spiritual Court *de Violenta Manuum injectione in Clericum*, the other shall have a Prohibition directed to the Judge. *F. N. B. 42 E.*

2. An Information in the Spiritual Court for laying violent Hands upon a Clerk in the Church, and Costs given; and the Defendant is excommunicated for Non-payment; but because it was not at the Suit of the Party, but on Information, in which Costs are not grantable, the Court awarded a Prohibition. *Mo. 540.*

3. Prohibition, and surmifeth that the Defendant was a Clerk, and made an Assault upon his Servant, and he coming in Aid of his Servant, and to keep the Peace laid his Hands peaceably upon him; whereupon the Defendant made an Assault upon the Plaintiff, who defended himself; and then the Clerk sued him in Court Christian *pro Violenta Injectione Manuum super Clericum*, where he pleaded all this Matter, and that if the Defendant had any Hurt, it was *de son Assault demesne*; but the Court Christian would not allow this Plea; but proceeded to



Sentence against him, and fined him 10*l.* and awarded Damages to the Clerk; whereupon he brought the Prohibition. The Defendant confesseth the Plaintiff pleaded this Plea in the Spiritual Court; but shews that the Plea was condemned there for Non-Attendance upon the Suit, and traverseth the Refusal of the Plea; and it was thereupon Demurred. *Godfrey* moved for a Consultation, for the Suit was well begun in the Spiritual Court, it being for beating of a Clerk by *Stat. Artic. Cleri*, vide *Nat. Br.* 51, and this Plea pleaded there was well triable there, as 1 *R.* 3. 4. 46 *E.* 3. 32. And then the Allegation for taking away the Jurisdiction of that Court is well traversable; as where a Cause alledged for removing of a Suit out of ancient Demesne Court, it is traversable, as 6 *H.* 4. 1. and 27 *H.* 6. 4. Wherefore, &c. *Gaudy* held, that this Case was out of the *Stat. of Artic. Cleri* and of *Circumspecte Agatis*; for here the Party had good Cause to beat the Clerk: And as to the Traverse it is not good; for the Surmise is not traversable, but he agreed the Case in Ancient Demesne; for otherwise the Lord should lose his Franchise; but it is not so in the other Case, as in the Case alledged to move a Plaint in a *Recordare*, it is not traversable; and of that Opinion were all the Court, wherefore it was adjudged for the Plaintiff. *Cro. Eliz.* 655. See 5 *Co. De Ju. Reg. Eccl.* 9. a.

4. If a Man lay violent Hands upon a Clerk and beat him, for the beating Amends must be in the King's Court, and for the Laying violent Hands upon him, Amends may

may be in Court Christian; therefore if the Judge in Court Christian award Damages for the Beating, he does against the Statute. *Dr. & Stud. lib. 2. cap. 32. fo. 118. b.*

## 2. Pleas in.

A Prohibition was awarded, upon Surmise that the Defendant, a Clerk, had assaulted the Plaintiff's Servant, for which the Plaintiff in the Prohibition peaceably put his Hands upon him, which he alledged in Court Christian; but they would not allow it; wherefore Prohibition, notwithstanding the Stat. *De Articulis Cleri, & Circumspecte Agatis*. See *Fitz. Nat. Br. fo. 51. 1 R. 3. 4 46 E. 3. 3. Mo. 915.*

## II. Where Clerk Criminofus.

1. THE Ecclesiastical Decree, that all Clerks in any Orders, Greater, or Smaller, should be exempt *pro Causis Criminalibus* before Temporal Judges, never was received, so never could have any Force here for Want of such Reception; and for that it was against the Laws of the Land, as appears by infinite Precedents, as well as the King's Prerogative and Sovereignty, that any of his Majesty's Subjects should not owe Obedience and pay Observance to the Laws made for the Government of the Realm. See *5 Co. De Ju. Reg. Eccl. 32. b. 33. a.* When Kings themselves and their Ministers, Judges, and Magistrates must so observe the  
Laws

## Jura Ecclesiastica.

Laws as to govern and determine by them, I take the liberty to say, it surpasseth Lay Assurance, or indeed of any other but confirmed Papists, and their Mercenary, or blind and besotted Adherents, and Tools of Church Usurpation and Oppression; (tho' it has been strongly laboured by the Clergy heretofore, as well Arch-Bishops and Bishops as all others of that Body) to say, any Ecclesiastic whatsoever, and much more so to contend, that every petit and inconsiderable Church Cleric should be exempt from all, or any, the Obedience due to the Municipal Laws of our Country; sure none will have the Countenance to pretend this, who have at all considered and weighed the dismal Effects of such an Exemption; tho' exercised only by church Incroachment, and that but for a short Time, when the greatest Wickednesses, even Murder itself, were not only suffered to go unpunished, but also countenanced, nay, even justified and maintained in Clericks by Guarding, Defending, and Supporting such being Murderers, &c. in Bishops Palaces, Religious Houses, and Sanctuaries, from the just Resentment of an offended Sovereign, and his most just, equal, and merciful, Temporal Laws, made and provided against such heinous Offences; and that because the Offenders were Clerks, &c. Scoffing the Rule, Interest Reipublicæ ne maleficia remaneant impunita.

2. In the reign of H. 2. The ancient Law was revived, (for tho' it had been, by Means of Disloyal and Traiterous Church-Men, for a time suppressed, it always was the undoubted Law of this Realm) That if any Clerk should commit Felony, that he should be hanged, if Treason, that he should be drawn and quartered. Da. 91, 92 a. b.

3. The



3. The Ecclesiastical Court may not examine any Capital Crime, as Felony, or the like, not even for Purposes examinable there; and therefore they may not examine such Crimes, though in Order to prove a Man *Criminosus*, much less, when he is so proved in the proper Superior Court, to which the Spiritual Courts are but inferior, may they impeach the Sentence or Judgment in a proper Court, in a Court improper, as their's, in such Case, is; but yet they may build a Sentence of Deprivation upon such a Conviction, and they are bound by it, and it is dangerous for any Ecclesiastical Judge to come against it. *Hob. 121. Searle's Case.*

4. Regularly the Ordinary, at Common Law, had no Power over a Clergyman in a Crime or Offence touching the Crown; but where such Power was given to him by the Common Law. *Hob. 290*; and therefore when the King's Court delivered the Offender to the Ordinary, it implied a Power, or a Permission of the Law, that he might deal with him to convict, or discharge him, according to the Form of their Laws; but since the Statute hath forbidden the Delivery of him to the Ordinary, it retains all Power itself, and denies the Ordinary's, and therefore if he, at Common Law, would have convened a Church-Man to have deprived or degraded him, for Felony before his Trial at Law, a Prohibition would have lain for holding Plea of a Cause of the Crown and prejudging the King's Court *in eadem*. Much rather then in the Marquis of *Winchester's Case*, 6 Co. 23. where a Prohibition was granted,

granted, to stop the Probate of a Will for Goods; because the said Will did also give Lands; for tho', in Truth, the Will be made *uno flatu*, and interlaced within one Continent or Writing; yet in Effect they are two Wills, and of diverse Natures and Effects, and Cognizances; whereas in the other Case, the Crime is all Temporal *idem Individuo*, and the End of the Conusance is only divers: That is, with us Capital, with them Deprivation, or Degradation, or the like. *Hob.* 290. *Cro. Jac.* 430, 431, same Case.

5. If a Clerk in Felony was found not guilty, and discharged, notwithstanding which the Ordinary would convene him again, and admit new Proof, that he was guilty, in Order to deprive him, they were to be prohibited; or if upon a Clerk's being delivered, *Absque Purgatione*, to the Ordinary, they would admit him to his Purgation, a Prohibition would lie, yea and a *Præmunire* too; and yet these Offences are not so highly a Plea of the Crown, as Criminal Causes; as amongst Criminal Causes there are Degrees, as Treasons, and even some against the King's own Person, also if they would proceed betwixt Conviction and Clergy, a Prohibition would lie for Prevention; for that the Cause is not yet finished in the King's Court: But if they would not controvert nor re-examine the Acts of the King's Courts, but build their Sentences upon them, they were not to be prohibited; as if they deprived a Man by Sentence, because he was convicted or attainted

tainted of Felony, Murder, or Manslaughter, at Common Law. *Hob.* 290, 291. *Cro. Jac.* 430, 431, same Case. 2 *Inst.* 637.

**III. Scandalous Words spoken of a Clerk.**

Vide ante, *Scandal, Slander, or Defamation.*

1. IF a Parson call *A.* a Drunkard; whereupon *A.* answereth, Thou liest, if the Parson sue him in the Ecclesiastical Court for giving him the Lie, a Prohibition lieth; for that the Cause for which he gave him the Lie, was not Spiritual, but depended upon a precedent Temporal Matter. *Mich. 7 Jac. Simpson and Water. Rol. Abr.* 295. Case 5.

2. If a Man call a Minister Knave, Searjeant Roll says, he may be sued for it, in the Ecclesiastical Court, and no Prohibition should be granted. *Prohib.* 295. Case 8. *sed quere de ceo. Sur 1 Vent. 2. ou un Prohib. suit grant en tiel Case.*

3. If *J. B.* say to *J. D.* it is reported that *J. N.* did or doth keep in his House a Man or a Boy to bugger, whereto *J. D.* answereth, the vile Villain would have done as much to me. If *J. N.* sue *J. D.* averring himself to be a Minister, a Prohibition lieth; because it is no Spiritual Defamation, and is Felony by Statute. *Mich.* 8 Car. B. R. *Higgon & Coppinger, intratur Hil.* 8 Car. *Rol.* 129. *Rol. Abr. Prohib.* 296, 297. Case 20.

4. If



4. If a Man libel for saying of him, thou art fitter for the Pillory, than for a Preacher, and that he spoke the Words in Time of Divine Service; and hereupon Sentence is given, that he should recant the Words, &c. if the Defendant shew to the Temporal Court, that he spoke them of a certain Release, &c. saying that the Plaintiff had forged the said Release, and on that Account the Words were spoken, so that he might have had an Action at Law for the Words, in such Case, tho' the Suit be maintainable in the Ecclesiastical Court for speaking the Words in Time of Divine Service, yet because Sentence is given that he should revoke the Words, which is for all, a Prohibition shall go for all. *Mich. 38 & 39 Eliz. Butler and Bartlet, Rol. Abr. Prohib. 316. Case 7.*

5. Prohibition, because the Plaintiff *Parlor* was convened before the High Commissioners, for saying to *Butler*, being a Minister, that he was fitter to stand on the Pillory than preach in the Pulpit, and that he had taken two Orders already, that he lacked but taking the third, which was, to have his Ears cut off; *Parlor* justified, because *Butler* had forged an Acquittance, and shewed it in certain; the Commissioners would not allow of this Justification; but censured him to ask Forgiveness; whereupon he brought the Prohibition, and it was adjudged maintainable; because the high Commissioners had nothing to do with this Cause, unless it was in Time of Divine Service. *Mo. fo. 460. Case 639.*

6. Dr. *Parsons* libelled against *Coxeter*, for saying of him, He had no Sense, was a Dunc,

*Dunce, and a Blockhead, and he wondered the Bishop would lay his Hands upon such a Fellow, and that he deserved to have his Gown pulled over his Ears,* a Prohibition was granted; for a Parson is not punishable in the Spiritual Court for being a Knave or a Blockhead more than another Man; and whereas it was urged, that a Parson might be deprived for Want of Learning; the Chief Justice said, if that be the Case he must bring his Action at Law; for that was a Temporal Damage; and a Prohibition was granted. *Salk. 692. See 1 Ven. 2.*

7. A Prohibition was prayed and granted, upon a Suit in the Ecclesiastical Court, by a Parson for calling him *Fool, Ass, and Goose,* for they are but Words of Heat, and do not touch him in his Profession. *2 Lev. 49.*

8. If a Clergyman be a Bailiff of a Manor to *J. S.* and he oppresses the Tenants, and one of them says to him, *Thou art a Knave, and fitter to wear a white Cloak than a black one,* if the Parson sue him for these Words in Court Christian, a Prohibition shall be granted. *Rol. Ab. Prohibition, 295. Case 6.*

9. *Hill. 6 Geo. 2. Bovey and Busby.*

The Parties being both Clergymen, the Plaintiff libelled against the Defendant in the Ecclesiastical Court for these Words, *You are an old Rogue, and a Rascal, and a contemptible Fellow, despised and bated by every Body;* and likewise for saying of him at another Time, *You are a Liar.* Mr. Filmer now moved for a Prohibition, notwithstanding the first Set of Words were said to be spoken against the Plaintiff

Plaintiff in his Eünction. The Lord Chief Justice doubted, whether, in such Case, the Ecclesiastical Court had not a Jurisdiction; however a Rule was made to shew Cause. Justice Page absent.

#### IV. Ecclesiastical Officers.

##### 1. Scandalous Words Spoken of.

**I**F *A.* a Surrogate sue *B.* in the Spiritual Court *ex officio, pro salute animæ, & morum reformatione, ex promotione* *C.* because that *C.* being a Proctor of the Spiritual Court, and a Master of Arts, the said *B.* said to him, *Thou art or he is a scabbed Knave, and a pickerel Bum-Bailiff, vel sic, I scorn to be abused by such a scabbed Knave, or such a pickerel Bum-Bailiff, as thou art,* and avers that it was spoken to defame *C.* and in Contempt of the Ecclesiastical Jurisdiction; a Prohibition lies; for it is not any Spiritual Slander, nor any Defamation to the Court. *Mich. 8 Car. B. R. Cory and Ward, Rol. Ab. Prohibition, 297. Case 22.*

##### 2. Their Offices Temporal, and therefore, as such, triable in the Temporal Courts.

###### 1. Chancellors.

**I**F a Bishop grant the Office of Chancellor to *A.* and *B.* and after *A.* releaseth to *B.* and then *B.* dies, and the Bishop gives



gives it to R. against whom A. sues in the Ecclesiastical Court, supposing the Release void, a Prohibition shall go; because the Office is Temporal, though he exercise the Office in Spiritual Matters. *Rol. Abr. Prohibition*, F. 38. 8 *Ja.* But if the Knowledge of the Chancellor in the Canon Law be the Question, no Prohibition to go; for they are the proper Judges. 39. *tamen quare.*

2. Affise was brought by Sir *John Bennet* for the Office of Chancellorship of the Archbishop of *York*; the Defendant endeavoured to gain an Injunction, out of the Star-Chamber, to stay his Suit, he being by Sentence and Decree there, (for Bribery and other Misdemeanors in his Office of Judge of the Prerogative Court) fined 20000*l.* and censured to be imprisoned and made incapable of any Office of Judicature, by Reason whereof, being disabled to hold that Office in Question, the Defendant obtained it, and pretended this Affise was brought by Sir *John Bennet*, that he might enjoy the said Office, contrary to the Decree; he therefore prayed to stay his Proceedings; whereupon Sir *John Bennet*, having Day given him to shew Cause, why an Injunction should not go, shewed then a Pardon from the late King, after the said Sentence, wherein was recited all the Bribery, and Offences contained in the said Decree, and all Punishments and Penalties by Reason thereof, and all Disabilities, and Incapacities, and all Things concerning the said Sentence, except the said Fine of 20000*l.* and and thereupon the Court of Star-Chamber requested Sir *John Waller*, Chief Baron, and

Sir *Francis Harvey*, third Justice of the Common Pleas, to call to them all the Justices and Barons, and to consider of the said Decree and Pardon, and to certify their Opinions, whether it were fit to permit the Proceedings in the Assise or not; and all the Justices and Barons being assembled at *Serjeants-Inn Hall*, the Sentence and Pardon were read before them, and the Case argued by Counsel on both Sides; and it was resolved by the Justices and Barons, that this Pardon hath taken away all Force of the Sentence in the Star-Chamber, except the Fine of 20000 *l.* and all Inabilities are discharged thereby, and that the Sentence never took from him the Office, but the Execution thereof; neither gave Authority to put in another; but if the Archbishop, before the Pardon, and after the Sentence, had appointed him to execute his Office, and he durst not do it, then, peradventure, the said Archbishop for his Non-attendance, might have seised the said Office, and granted it to another; but the Sentence of itself could not take away the Office, being a Freehold: And the Pardon having taking away all the Offences; they therefore conceived it convenient to permit him to proceed in the Assise; and if doubtful, it may be found specially, and so receive a judicial Hearing. *Cro. Car. fo. 55, 56.*

## 2. Surrogate.

### 1. Who to be, and his Duty.

1. No Chancellor, Commissary, Archdeacon, Official, or any other using Ecclesiastical Jurisdiction, shall at any Time substitute, in their Absence, any to keep any Court for them, except he be, either a grave Minister, and a Graduate, or a licensed publick Preacher and a beneficed Man, near the Place where the Courts are kept, or a Bachelor at Law, or a Master of Arts at least, who hath some Skill in the Civil and Ecclesiastical Law, and is a Favourer of true Religion, and a Man of modest and honest Conversation, under Pain of Suspension for every Time that they offend therein, from the Execution of their Offices, for the Space of three Months, *toties quoties*; and he likewise who is so depured, being not qualified as aforesaid, and yet shall presume to be a Substitute to any Judge, and shall keep any Court, as is aforesaid, shall undergo the same Censure, in Manner and Form, as is before expressed.

Can. 128.

### 2. In *Canc.* 1 May 1740. *Havers* and *Havers*.

If the Court of Chancery see the Exercise of a Jurisdiction by a Surrogate, be to an Infant's Prejudice, where the Administration is but a limited one, as *durante minoritate*, and the Administrator a Trustee for the Infant, it is incumbent on Chancery to interfere, and take Care that the Infant be not prejudiced, in such Case, especially



where the Administration was, as my Lord Chancellor said, in the principal Case it had been, granted in a careless, slovenly, and scandalous Manner, and where it was incumbent on the Surrogate to have taken Care, as the Estate was considerable, the Administration should have been granted to a responsible Person, and not to a poor and indigent one, as was the principal Case.

### 3. *Proctor.*

#### 1. *How retained, and his Duty.*

1. None to procure in any Cause, unless thereto constituted and appointed by the Party himself, either before the Judge, and by Act in Court, or unless in the Beginning of the Suit, he be by true and sufficient Proxy thereunto warranted and enabled; we call that Proxy sufficient, *saieth this Canon*, which is strengthened and confirmed by some authentical Seal, the Party's Approbation, or at least his Ratification therewithal concurring, all which Proxies shall be forthwith by the said Proctors exhibited into the Court, and be safely kept and preserved by the Register, in the publick Registry of the said Court; and if any Register offend therein, he is to be seclused from the Exercise of his Office, for the Space of two Months, without Hope of Release or Restoring. *Can. 129.*

2. For lessening and abridging the Multitude of Suits and Contentions, as also for preventing the Complaints of Suitors in Courts Ecclesiastical, *who many Times are*  
over-

*overthrown by the Oversight and Negligence, or by the Ignorance and Insufficiency of Proctors, and likewise for the Furtherance and Increase of Learning, and the Advancement of Civil and Canon Law, following the laudable Custom heretofore observed in the Courts of the Archbishop of Canterbury, it is willed and ordained by that Canon, That no Proctor exercising in any of them, shall entertain any Cause whatsoever, and keep and retain the same for two Court-Days, without the Counsel and Advice of an Advocate, under Pain of a Year's Suspension from his Practice; neither shall the Judge have Power to release, or mitigate the said Penalty without exprefs Mandate and Authority from the Archbishop. Can. 130.*

3. No Proctors shall conclude any Cause depending, *without the Knowledge of the Advocate retained and feed in the Cause, which if any Proctor shall do or procure to be done; or shall, by any Colour whatsoever, defraud the Advocate of his Duty or Fee; or shall be negligent in repairing to the Advocate and requiring his Advice, what Course is to be taken in the Cause, he shall be suspended from all Practice for the Space of six Months, without Hope of being thereunto restored, before the said Term be fully compleat. Can. 131.*

4. As it is found by Experience, that the loud and confused Cries and Clamors of Proctors in the Courts of the Archbishop, are not only troublesome and offensive to the Judges and Advocates, but also give Occasion to the Standers-by of Contempt and Calumny towards the Court itself; that

more Respect may be had to the Dignity of the Judge than heretofore, and that Causes may more easily and commodiously be handled and dispatched, all Proctors in the said Court, are specially to intend that the Acts be faithfully ordered, and set down by the Register, *according to the Advice and Direction of the Advocate*, that the said Proctors refrain loud Speech and Brabbling, and behave themselves quietly and modestly, and that when the Judges or Advocates, or any of them, shall happen to speak, they presently be silent, upon Pain of silencing for two whole Terms then immediately following every such Offence; and if any of them shall a second Time offend, and after due Monition shall not reform himself, let him be for ever removed from his Practice. *Can. 133.*

#### 4. Register.

##### 1. Is a Temporal Officer.

1. If there be a Question between two Persons upon two several Grants, which shall be the Register of the Bishop's Court, it shall not be tried in the Bishop's Court; but at Common Law; for though the *Sub-jectum circa quod* be Spiritual, yet the Office is Temporal. *Rol. Abr. Prohibition, T. 35 or 36. F. Case 43.*

\* 2. *Hill. 8 Geo. 2. B. R. The King and Wheeler.*

Mr. Strange moved for a *Mandamus* to the Deputy-Register of *Durham*, to deliver over to his Principal all publick Books relating



lating to that Office; the Deputation being expired; and the Case of *Herne* and ——— *Paf. 6 W. 3.* was cited, where, after the Right to the Office of Register of *Hereford* was tried in an Assise, the like Motion was granted; and accordingly Rule was to shew Cause; and now in *Easter Term* Mr. *Fenwick*, coming to shew Cause, he laid down the Fact to be thus, That the Deputy was *August 1731* appointed Deputy to one *Trotter* for three Years, and that in *December* following the Register and his said Deputy, the Defendant, came to another Agreement, that after the Expiration of these three Years the Defendant should injoy this Office four Years longer. This Agreement, tho' in Writing, was not under Seal; hereupon the Defendant brought his Bill in Chancery against *Trotter* to enforce a specifick Execution of this Agreement, and in that Court Proceedings had been therein to Publication, and on this State of the Case, he submitted it, the Rule ought to be discharged; he said, *Mandamus's* of this Sort were not due *ex debito justitiæ*; and as there was a Suit depending concerning this Office, that was a sufficient Reason for the Court's refusing it, to which Purpose was cited the Case of *The King and Vincent*. Mr. *Strange* argued, on the other Side, that *Mandamus's* ought to be granted by the Court *de jure*, and said the Dispute in Chancery is merely relating to an equitable Interest, but the Books ought to be granted to him who has the legal Possession of the Office. My Lord Chief Justice declared, he did not think these Writs were to be granted *de jure*, but that the proper Reason

son and Occasion for granting them is, where otherwise the Course of Justice would be obstructed; he did not think, that where-ever a Person was in Possession of an Office, that the Court ought always, for that Reason only, to give him Possession of the Books also, by a Writ of *Mandamus*. Suppose a Man is a Disseisor of an Office, the Court will not do it. And *Vincent's Case* cited his Lordship thought a Case in Point, and a full Authority to the present Purpose; and there his Lordship observed, the Court refused to grant a *Mandamus* to the Bishop of *London*, to grant a Licence to a Lecturer, on this Reason only, that a Suit was then pending in the Court of Exchequer concerning the Lectureship; so in the principal Case the Rule was discharged. In *Hill. 9 Geo. 2.* Mr. *Fenwick* came again and offered for Cause why a *Mandamus* should not go to the Defendant to deliver the Books over to his Principal: He agreed indeed, that the present Case had some Appearance of Variance from what it was on the former Motion; for now it is insisted upon in the first place, that a Decree has past against *Wheeler*, and in the next place, that he is run away, and deserted his Office; however he submitted it, those Objections might both of them receive a very proper Answer; as to the first of them, he said, though *his Honour of the Rolls* had decreed against *Wheeler*; yet an Appeal from that Decree is now pending. And to the second he said, *Wheeler* had delivered over the Custody of the Books to a Person of known Ability and Reputation. My Lord Chief Justice said, had

had this Matter of the Party's Deserting the Office appeared on the former Motion, he should even then have been for granting the *Mandamus*, though no Decree was at that Time; and said further, there being a Decree now pronounced, though appealed from, was certainly an additional Circumstance for granting the *Mandamus*; the rest of the Judges according with his Lordship, the Rule was made absolute.

3. 8 & 9 Geo. 2. *B. R. Stephens and Rooding.*

This was a Motion to supersede a *Mandamus*, to restore *Richard Stevens* to the Office of Register of the Archdeaconry of *Leicester*, said by Counsel, that *anno 1710.* a Grant was by the Archdeacon of this Office to one *Rooding* in Reversion expectant on a former Patent to *Stephens*, afterwards *Rooding* came to the Possession of this Office, and continued 21 Years in it, during which Time he appointed *Richard Stevens*, his Deputy; and *anno 1731.* the Archdeacon granted a Patent to *Richard Stevens*, that he might be able to try the Validity of *Rooding's* Grant; and thereupon *Richard Stevens* insisted on keeping the Possession of this Office in his own Right; whereupon *Rooding* applied for and obtained a *Mandamus* from this Court to restore him, and the Validity of his Grant received a Determination for him by Verdict, since which, there hath been a Writ of Error in the Exchequer-Chamber upon that Judgment, which was affirmed; and thereupon another Writ of Error was brought before the House of Lords, whereon was a *Non-pros*; wherefore he submitted it, that  
it



it was not reasonable that this Matter should go through any farther Examination on a second *Mandamus*. But my Lord Chief Justice said, that the former *Mandamus* was granted to the Archdeacon, and not to *Richard Stephens*; so that this Case is no more than the common one, where two Persons are contending about the Right to an Office; as of Capital Judges, one of them brings a *Mandamus*, the Corporation submits to it, yet the other may have a new *Mandamus* notwithstanding; and Page Justice said, the Court did the same Thing, in the Case of Mr. Barcoat, concerning the Office of a Clerk of Assise; and the Rest of the Court were of the same Opinion, and accordingly the Motion was refused.

## 2. His Duty.

### 1. General to.

If any Register, or his Deputy, or Substitute whatsoever, shall receive any Certificate without the Knowledge and Consent of the Judge of the Court, or willingly omit to cause any Person cited to appear upon any Court-Day, to be called, or unduly put off or defer the Examination of Witnesses to be examined by a Day set and assigned by the Judge, or do not obey and observe the judicial and lawful Monition of the said Judge, or omit to write, or cause to be written, such Citations and Decrees as are to be put in Execution, and set forth before the next Court-Day, or shall not cause all Testaments, exhibited into his Office, to be  
 registred

registred within a convenient Time, or shall set down or enact as decreed by the Judge any Thing false or conceited by himself, and not so ordered or decreed, or in Transmission of Processes to the Judge *ad quem*, shall add or insert any Falshood, or Untruth, or omit any Thing therein either by Cunning or gross Negligence; or in any Causes of Instance, or promoted of Office, shall indirectly, with either Party in the Suit, or in the Execution of their Office, shall do ought else maliciously or fraudulently, whereby the said Ecclesiastical Judge or his Proceedings may be slandered or defamed, *it is by this Canon ordained* such Register, or his Deputy, or Substitute offending in all or any of the Premisses, shall by the Bishop of the Diocese be suspended from the Exercise of his Office, for the Space of one, two, or three Months, or more, according to the Quality of his Offence, and that the said Bishop shall assign some other Publick Notary to execute and discharge all Things pertaining to his Office during the Time of his said Suspension. *Can. 134.*

2. *Proctors*, Proxies of Retainer are to be safely kept and preserved by Registers, on Pain of Suspension. *Prout in the Canon 129.*

2. *To set up Tables of Fees.*

It is appointed, that the Register belonging to every Ecclesiastical Judge, shall place two Tables containing the several Rates and Sums of all the said Fees, one in the usual Place, or Consistory where the Court is kept, the other in his Registry, and both of

of them in such Sort that every one concerned may, without Difficulty, come to the View and Perusal thereof, and take a Copy of them, and if any Register fail therein, he is to be suspended, till he cause the same to be done: And the said Tables being once set up, if he shall at any Time remove or suffer the same to be removed, hidden, or any Ways hindered from Sight, contrary to the true Meaning of that Constitution, he shall for every such Offence be suspended for six Months. *Can. 136.*

### 5. *Apparator.*

#### 1. *What.*

He is the Messenger who cites Offenders to appear in the Spiritual Court, and he serves the Processes thereof. *Bo. Law Dict. sub hoc Tit.*

#### 2. *His Office.*

##### 1. *His Duty therein.*

For the Redress of such Abuses and Grievances as are said to grow by Summoners or Apparators, and that the Multitude of Apparators be (as much as is possible) abridged or restrained, it is by this Canon ordained, that no Bishop or Archdeacon, or their Vicar, or Officials or other inferior Ordinaries, shall depute or have more Apparators to serve in their Jurisdictions respectively, than either they or their Predecessors were accustomed to have thirty Years before the Publishing of these Constitutions

or



or Canons, *anno* 1603. all which Apparators are orderly themselves to execute their Offices, and that they do not by any Colour or Pretence whatsoever, cause or suffer their Mandates to be executed by any Messenger, or Substitutes, unless upon some good Cause to be first known and approved by the Ordinary of the Place; moreover they are not to take upon them the Office of Promoters, or Informers for the Court, neither to exact more or greater Fees than are in the said Constitutions prescribed. And if either the Number of the Apparators deputed shall exceed the aforesaid Limitation, or any of the said Apparators shall offend in any of the Premises, *the Persons deputing them, Nota divers- if they be Bishops, shall, upon Admonition fitatem. of their Superior, discharge the Persons exceeding the Number so limited. If inferior Ordinaries they shall be suspended from the Execution of their Office, until they have dismissed the Apparators by them so deputed,* and the Parties themselves so deputed shall for ever be removed from the Office of Apparators, and if being so removed they desist not from the Exercise of their said Offices, let them be punished by Ecclesiastical Censures, as Persons contumacious. Provided, that if, upon Experience, the Number of the said Apparators be too great in any Diocese in the Judgment of the Archbishop of *Canterbury*, for the Time being, they shall by him be so abridged, as he shall think meet and convenient. *Can. 138.*



2. *Is Temporal.*

\* *Pasch. anno 1727. B. R. The King and Betsworth.*

Mr. Reeve moved for a *Mandamus* to be directed to Dr. *Betsworth*, Judge of the *Pe-rogative Court*, to admit *Folke* to the Office of *Apparator General*, he said the Office was a *Freehold*, and that he remembered the like Motion made by the *Predecessor* of the present Gentleman, and allowed. *Reynolds* and *Probin*, Justices, only sitting, Justice *Reynolds* said, that *Mandamus's* had been denied in the Case of a *Proctor*, and therefore, as they were not clear in the Point, they made a Rule to shew Cause. *Vide Salk. 468. 3 Mod. 335.*

6. *Parish-Clerks.*

1. If the Church-wardens have used, Time out of Mind, to elect the Clerk, and a Suit is in the Ecclesiastical Court to remove him, and put in another at the Nomination of the Parson, a Prohibition lieth. *Rol. Abr. Prohibition, F. 42. Mich. 22 Ja. Case Walpole and Coldwell*, a Prohibition by Consent to try a Custom. *Hill. 22 Ja. & Pas. 19 Ja. & Pas. 11 Ca.*

2. If a Parson libel in the Spiritual Court against several of his Parishioners, for Interruption in placing a Clerk, and, upon Suggestion, that the Parishioners by Prescription, Time whereof, &c. were used, to elect a Clerk, a Prohibition was granted:

And so had been granted before, 19 *Ja.* in *Crasshaw's Case*, Parson of *Whitechapel*, and in several other Cases. *Palm.* 379.

3. If the Clerk of a Parish claims by Custom to have so much Bread of every Inhabitant at *Christmas*, and sue for it in the Spiritual Court, a Prohibition lieth; for it is not like a Pension due to a Parson. *Roll. Abr. Prohibition, F. Case 43.*

4. *Trin.* 1727. *B. R. Townsend and Thorpe.*  
Motion was for a Prohibition to stay Proceedings in the Ecclesiastical Court, who was there proceeding to deprive the Plaintiff of the Office of Parish-Clerk, whereto the Parson had appointed him, and this Motion was intended to be grounded upon a Charge of Sodomy, but the Motion was rejected; for that it was, as the Court said, unfit that a Man should be suffered to remain in such Office who was guilty of so great a Piece of Bestiality, and rather denied the Prohibition; for that the Temporal Courts had no Way of depriving him; and the Court said, they grounded themselves upon a like Case, 1 *Lev.* 138. where a Prohibition was moved for, and refused, to stop the Spiritual Court from proceeding to deprive one for forging Orders, (the same Case is in 1 *Sid.* 217.) they said further, that the Office of a Parish-Clerk, even when he came in by Election; and therefore, as I conceive, even in such Case, they would have refused the Prohibition; That a Man coming into an Office by Temporal Hands, would not change the Nature of the Office. As I take it, this Case is not unlike some Cases of Seamen's Wages, where the Temporal Courts  
*will*



will allow the Admiralty to take Cognizance of Matters which do not strictly fall within their Jurisdiction, on Account of the Aptness of the Remedy, which, in such Cases, are there given. *Vide* Case Buck and Atwood, B. R. Pasch. 1727. Newcomb and Higgs, B. R. Hil. 4 Geo. 2. The King and The Bishop of Litchfield and Coventry, concerning Rushworth Usher of Coventry School, under this Title, Division School-Masters; as to this Court's suffering the Ecclesiastical Courts proceeding in such particular Cases on Account of the Fitness of their Remedy.

\* 5. Mich. 4 Geo. 2. B. R. Speak v. Born & al.

Dr. Andrews came now to shew Cause why a Prohibition should not go to the Commissary of St. Paul's, to stay proceeding there in a Suit by the Church-Wardens of St. Giles's Cripplegate, to compel the now Plaintiff, Speak, to take a Licence from the Ordinary in order to qualify him to act as Deputy to Venn, a Clergyman, appointed Clerk, according to Canon; he said there were two Points, which would properly fall out in this Inquiry; one was, whether a Clerk of a Parish can make a Deputy; the other was, that admitting he may, whether such Deputy may be obliged to take a Licence? To the first Point, he submitted it, a Parish Clerk could not make a Deputy: The Exercise of this Office related to Matters meerly Spiritual; and therefore the Office was to be considered, as Ecclesiastical, especially when supplied by a Parson, as this Case is, the Consequence of which was, that such Officer could not make a Deputy; for the

the Rule of the Civil and Canon Law is, that all Persons shall exercise their Offices themselves, in proper Person, and not call in Aid the Assistance of any other. To the other Point, he allowed there was no express Canon which required these Officers, that even act in Person, as Parish Clerks, to take a Licence, but the Canons 1603 do appoint the Bishops *Præordinator omnium*, and the Construction of this Canon has been, That Clerks of Parishes shall be under the Regulation of the Bishop, and shall take Licences, and then he argued, that, as this was reasonable that the Clerks themselves should take Licenses, there was equal Reason that their Deputies should do it also. Mr. Reeve, on the other Side, urged, that this Office was considered in Law, as Temporal, and to the Purpose cited 13 Co. 70. 18 E. 3. 27. Mar. 101. 1 Keb. 286, and if this was so, then he submitted it, as a Consequence, that the Clerk might make a Deputy; he said, it's determined that a Constable may, and so it was of all other Officers. And, as another Consequence, he submitted it, there's no Occasion for a License. The Court at present inclined to think the settled Distinction was, that this Office is considered, as Temporal, when supplied by the Parish upon a Custom, but Spiritual, when supplied by the Parson, according to the Canon; however they thought proper to grant a Prohibition, that the Party might declare in it, and gave a Week's Time; though Serjeant *Chapple* said, that four Days was the usual Time. The Plaintiff having declared in Prohibition, this Matter now came

## Jura Ecclesiastica.

on again upon Demurrer to the Defendant's Plea this present *Easter Term*, and Serjeant *Eyre*, for the Plaintiff, argued, that there were divers Authorities in the Books, which declared a Parish Clerk, a Temporal Officer, and he particularly cited *Palm.* 379. *Cro. Jac.* 670, and said, no Difference was taken as to the Manner of his coming in; but if that Point was to be given up, still upon the general Nomination of the Parson, he has an Estate for Life in the Office; and then this Court has a Right to grant its Prohibition, and prevent the Spiritual Court from depriving such Officer, and to this Purpose cited 2 *Brownl.* 11. in the Case of a Chancellor of a Diocese; and so it is in the Case of a Register. He further insisted, that the Ecclesiastical Court had no Power or Authority to require a Clerk to take a License. Serjeant *Chappel*, on the other Side, submitted it, that whatever was the Authority of the old Books, that a Clerk is a Temporal Officer in its Nature; yet the Court has, of late, taken a Difference between the Manner of coming into this Office; and this, he insisted, appears from the Case of *Townsend* and *Thorpe*, where the Court allowed the Spiritual Court to proceed in depriving a Parish Clerk, where he was nominated by the Parson, which, he said, he apprehended they would not have done, had he been elected by the Parish, he then said, the Nature of this Office made it unfit, that it should be supplied by a Deputy. Personal Qualifications are required in a Clerk of a Parish by the 91 *Can. Anno* 1603. as he must be 20 Years of Age, able to read and write, and



and of a competent Understanding in Singing, if it may be; and *Gibson* in his Construction upon that Canon, says, they were originally Assistants to the Minister; he also observed, that these Inferior Officers, in general, could not make Deputies; a Constable, he said, could not; but in Necessity, as extreme Sickness, or Infancy, or the like; as where a Woman is, and so, he said, was 2 *Keb.* 309, 355. Then as to the Taking a License, he agreed, that indeed he knew no direct Authority for it; but a Lecturer is certainly obliged to do it; and he submitted it, that the present Case was within the same Reason. My Lord Chief Justice said, he did not remember any express Resolution, that a Clerk was a Spiritual Officer; and as to the Case of *Townsend* and *Thorpe*, he did not remember what that Case went upon; but as to the License, he questioned whether it was necessary. *Probin Ju.* now Lord chief Baron, said, he well remembered the Case, *Townsend* and *Thorpe*, and that it went upon that Point singly; that the Clerk there was a Person absolutely unfit to execute the Office; and therefore this Court would not hinder the Ecclesiastical Court's depriving him, as this Court had not an ordinary Method of doing it themselves. And he thought the Court made no Sort of Distinction between the different Methods of the Clerks coming in. And as a further Authority, that a Parish Clerk is considered a Temporal Officer, he cited the Opinion of my Lord *Holt* in 6 *Mod.* 253, *Lee* Just. also cited a Case out of *Salk.* 536, where it is held a Clerk of a Parish, tho' named by the Parson,

son, gains a Settlement within the Stat. 9 & 10. *W. and M.* as executing a Temporal Office; and as to the Lecturer's taking a Licence, he said, that is absolutely by Statute. *Page Just.* also was of Opinion, that a Parish Clerk was in all Cases to be considered a Temporal Officer: The Matter however stood over to *Mich.* Term, when Mr. *Reeve*, for the Plaintiff, argued, that there were in the present Case three Points proper for the Determination of the Court. 1st, Whether a Parish Clerk can make a Deputy? 2dly, Whether a Parish Clerk is a Temporal Officer? And 3dly, Whether a Licence is necessary? To the first Point he said, that in *Rol.* 274, and in *Mo.* 845, it is resolved, that a Constable may make a Deputy, and so may a Dean; and yet in 13 *Co.* a Dean is held to be a Spiritual Officer; and he submitted it, that the general Distinction in the Books was, between Judicial Officers and those who were Ministerial only. To the second Point, he agreed, that in some of the Books a Parish Clerk is taken to be a Spiritual Officer; but said, that wherever this Question has come judicially before the Court, they have always considered him as a Temporal Officer, whereto he cited 13 *Co.* 70. *Ma.* 101. 1 *Keb.* 286, he said, he apprehended that the different Manner of appointing a Parish Clerk could not possibly make the Office itself different, in one Case, from what it was in the other. In some Places, he observed, Church-Wardens are chosen by the Parish, in others they are nominated by the Parson; but yet the Nature of the Office does in all Cases continue the same. In the present Case, he agreed,

agreed, that the Exercise of this Office really was *circa Spiritualia*; but yet he submitted, it by no means would follow, but that the Right and Title to the Office may be of Temporal Cognizance: And in the Case in Question, he observed, the Libel complained, that the Plaintiff intrudes upon the Defendant, by which it plainly appears, that the Title to this Office is really in Dispute, and on this Score cited 2 *Rol. Abr.* 285. 2 *Brownl.* 11. *Mandamus's* have been often granted to admit these Officers, as appears from 1 *Lev.* 75. 2 *Lev.* 18. *Ven.* 143. To the third Point, he said, the Proof of that lay upon the Defendant, and it will not be enough neither, for them to shew that there was a Canon which required a Licence; but they must shew further, that such Canon has been received and allowed by the Common Law, &c. Mr. *Marsh*, on the other Side, argued and said, as to the Case cited out of *Rol. Rep.* of a Constable's making a Deputy, it has been questioned, and said, so it was in *Sid.* 355. and as to the Case of a Dean's making a Deputy, he agreed, in some Places there is a Vice-Dean; but he believed that depended only upon Local Statutes, and he apprehended, it was never received for Law, that he could make a Deputy; at least, he submitted it, the Law at this Day is taken to be otherwise; he also submitted it, that the Distinction taken between Judicial and Ministerial Officers must not be received in so large a Latitude; for that there's a Difference between some Ministerial Officers and others; those that require Skill and Judgment cannot make a



Deputy without exprefs Words in their Patents; though others might, and cited 2 *Rol. Abr.* 154. that the Marshal of *England* cannot and in *Dy.* 278. it appears, that there was a Clause in his Patent giving him a Power so to do, and he relied upon 3 *Cro.* 187. *Plow.* 379. *b.* and to shew that the Sense of the Legislature has lately been, that a Parish Clerk cannot make a Deputy, he said, in a late Act of Parliament, which passed the third of his now Majesty, and which was made for creating the Parish of *St. Nicholas, Deptford*, it is provided by an exprefs enacting Clause, that the Parish Clerk shall have this Power of making a Deputy: Then, as to the Question, whether his Office was Spiritual or not, he submitted it, that the whole Employment was so; he said too, it was well known that anciently Parish Clerks were of the Order of the Clergy, and not of the Laity; and he said, in 2 *Rol. Abr.* 227 it appears, that by the Canon, the Parson has a Right to appoint him: And as to *Mandamus's* going to admit Parish Clerks, he said, he believed the Court did not grant those Motions, but on Affidavit that they were elected by the Parish, and for the Purpose cited *Salk.* 468. To the last Point, he agreed, that he could find no Canon making these Licenses necessary, but the innumerable Instances of them, he submitted it, was an Evidence that such Canon has been received and allowed; tho' cannot now be found; and said, that the Ecclesiastical Courts are governed by the *Lex non Scripta*, as well as ours. My Lord Ch. Just. said, that the Marshal was considered partly as a  
Judicial

Judicial Officer; for wherever Battle is joined, he is to determine that Matter; and said, it was certain, that even a Ministerial Office, which requires Skill, cannot be executed by Duty, without Words in the Grant for that Purpose; he said, he had some Doubt, how that was to be understood as to the Constable, for if a Justice of Peace directs his Warrant to a Constable, he questioned whether the Constable could appoint by Word of Mouth, that another should execute it. As to the Nature of the Office, he said, he was well satisfied, that the different Methods of appointing this Officer, could not make his Office different in one Case from what it was in another; the Case of *Townsend* and *Thorpe*, he said, was determined intirely upon its particular Circumstances; The Temporal Court permitted the Ecclesiastical Court to deprive the Party there singly, by Reason of the enormity of his Crimes. As to the Matter of the Licence, he said, he could not see how it could be maintainable, and his Lordship also observed, the Suit below was principally instituted to deprive the Party for his not obtaining one; and therefore his Lordship said, he was of Opinion, the Prohibition must stand. *Page* Just. was clearly of Opinion, that the different Methods of coming into an Office, could, in no Case, make the Office itself to be different. In the Case of *St. Clement's*, the Court was of Opinion, that this Office of a Parish-Clerk was Temporal, if so, this Court would not suffer the Court below to deprive him. *Lee* Just. said, that the Question, whether this Office is Spiritual, or not, strikes at the

whole; he agreed, that the Business of the Office was *circa spiritualia*; but yet said, he could not see but the Office must be considered Temporal: A Custom for the Parish to chuse such Officer is agreed, on all Sides, to have been good: If this Office had been considered as Spiritual, he could not see how the Lay-Gents could have any Thing to do with it; and therefore he thought the Canon seemed, in this Respect, to be an Innovation upon the Common Law: As to the Office of Dean, he said, it was certain, that it was many Times, till Queen Mary's Time, executed by Laymen. The Court was of Opinion, that the Prohibition should stand; yet, at the Desire of the Defendant, gave Leave for another Argument: And now Mr. *Filmer*, for the Plaintiff, first submitted it, that the Office of Clerk of a Parish was merely Temporal, he observed, that there were several Authorities cited upon the former Argument to prove it, and he craved Leave to cite a few more, and accordingly cited *Godb. 163. Hill. 22 Ja. in the old Edition. Benk. 142. 1 Leon. 94. 3 Fitz. Abr. Tit. Annuity, 40.* which Case is also in *Hugh's Parson's Law 279.* and said, if this Office in the Nature of it was considered as Temporal, he conceived, there could not be any Difference, whether he was nominated by the Parson, or elected by the Parish. If this Point was with him, he apprehended, that the clear Consequence would be that he might make a Deputy; and for this Purpose cited *Mo. 885. 3 Bulst. 77. 9 Co. 48.* yet supposing, for Argument's Sake, it were admitted, that the Office was Spiritual; yet no Case has been cited, on the



the other Side, to shew it necessary to take a Licence; and if that Point was with the Plaintiff, the Prohibition must necessarily stand; for the whole Tenor and Pursuit of the Libel is upon that Matter singly. Mr. *Fazackerly*, on the other Side, argued, that all the Citations, which have been made, to shew that this was a Temporal Office, were only *obiter* Sayings of Judges pretty much about the Times of *Jac. I.* except the Case in *Fitz. Ab.* but he apprehended that Case went a great deal too far; for that it is there held, that a Parish-Clerk is an Officer at Will only; and he said, he conceived, that general Experience shews this to be otherwise; and it having been held, that such Office gains a Person a Settlement, proves it to be otherwise; he observed also, that the Case *Mallard and Smith, Hill. 8* of the late Queen, was a much later Case than any cited, and was an Authority directly on the other Side; there a Clerk of a Parish sued in the Ecclesiastical Court for a Pension, on Motion for a Prohibition, the Court held, that a Suit would well lie; for that he was a Spiritual Officer: And in the Case *Townsend and Thorpe*, cited on former Argument, the Court was expressly of Opinion, that he was to be considered as a Spiritual Officer, when he came in at the Nomination of the Parson, which was enough for the present Purpose. But, admitting that he was to be considered as a Temporal Officer; yet this was an Office of Skill; and therefore as there were no Words in his Nomination, giving him a Power to make a Deputy, he could not do it. It cannot be denied, but the Matters which a Clerk exerciseth

ciseth himself in, are Matters relating to the Church; wherefore he submitted it, it could not be denied, but that the Ecclesiastical Court had a general Jurisdiction over him; and a Suit therefore against him, in that Court, for Matters relating to the Execution of his Office, could not be said, but to be rightly instituted; and if there are any Matters thrown into the Libel, which are, of themselves, of a Temporal Nature; yet if they relate to him in the Execution of his Office, he apprehended, this Court would not grant their Prohibition; and cited 1 *Lev.* 138. 1 *Sid.* 217. 1 *Cro.* 65. 1 *Ven.* 64. *The Lord Chief Justice*: A Clerk may make a Deputy, and that, whether he come into this Office by the Nomination of the Parson, or by the Election of the Parish; the Office must be considered the same in the one Case as the other; and of the same Opinion was *Page Justice*; and *Lee Justice* thought there was no Occasion to determine, whether this Office was Temporal, or not; but the Common Law Books were very strong on that Side of the Question; and he said, he had a Note from a Gentleman at the Bar, in Lord *Holt's* Time, where a Suit was instituted, in his Lordship's Time, by a Clerk in the Ecclesiastical Court for his Salary; and on Motion, the Court granted a Prohibition. Yet what the Court in general grounded their Opinion upon, in this Case, seemed to be, the plain Tenor of the Libel against the Plaintiff's being for his not taking a Licence, which they could not see any Law obliging him to; wherefore Rule was that the Prohibition should stand.

6. Pas. 6 Geo. 2. B. R. *Austin and Jarvis.*

The Case was thus, There being a Vacancy of Parish-Clerk of *St. Anne's Limehouse*, the Plaintiff and Defendant, together with one *Harry Babstock*, were Candidates, and the Election came on the sixth of *October*, when the Vestry, who had the Nomination, agreed to proceed by Balloting, and accordingly every Vestryman put his Vote or Ballot into the Hat of *Graves*, then Church-warden, and on telling them out, there were thirty-four for the Defendant, two only for the Plaintiff, and thirty-two for *Babstock*; *Graves* the Church-warden, who espoused *Babstock's* Interest, objected to the Vote of one *Ackard*, who had voted for the Defendant, (though he after allowed *Ackard* to be a good and sufficient Voter) also *Graves* insisted, that, as Church-warden, he himself was intitled to two Votes; and accordingly voted a second Time for *Babstock*, and then under Pretence that *Ackard's* Vote was not good, and that he the said *Graves* had a double Vote, as aforesaid, he the said *Graves* insisted, that the Defendant and *Babstock* having equal Number of Votes, the Vestry should proceed to another Election, which the Defendant and his Friends absolutely refused, and insisted on the Defendant's being duly elected, and demanded his Admittance to the said Office, which *Graves* refusing, several of the Defendant's Friends left the Vestry, and the Defendant, by the Advice of his Friends, went directly and entered a *Caveat* in the Ecclesiastical Court against any one's being sworn in, or having a Faculty. And on the *Sunday* next following the Election, having taken the above pre-  
vious



vious Steps, the Defendant, and his Friends of the Vestry with him, went to the Church and applied themselves to *Graves*, as Church-warden, and tendered the Defendant as Clerk, and demanded of *Graves* to deliver him Possession of, and to admit him into, the Clerk's Desk, which *Graves* absolutely refused; and on the 15th of the same *October*, *Graves* being still Church-warden, called another Vestry, and being, in Combination with *Legbone*, the Parson and others, against *Jarvis*, before the Vestry-Book was brought to the Vestry-Room, he (*Graves*) at his own House caused one *Richard Dunne*, who was Son and Clerk to *Dunne*, the Town-Clerk, to make an Entry in the Vestry-Book, purporting an Appearance of *Jarvis* at the Vestry, and consenting to withdraw his Licence, and to abide the Event of another Election, which Entry was not only made before the Vestry assembled, and before *Jarvis* had, or could have, appeared; for that, at the Time of the Entry of this Matter, there was not any Vestry congregated, before whom *Jarvis* could possibly appear; but also was without either his Consent or Privity; and not only so, but also contrary and directly opposite to what he and his Friends had all along, and at that very Vestry did, insist upon; but notwithstanding these being the true Circumstances of the Case, the said *Graves*, on the 31st of *December* following, called another Vestry, (being the third called on that Account) and though the Defendant and his Friends also did insist, as before, on his being duly elected, and his Right to the said Office in Virtue of such due Election; and absolutely refused to submit to any further

ther or other Election, or to stand again, as a Candidate, for the said Office; yet the said third Vestry, (by the Influence of *Graves*, and all, or some of his, Confederates) proceeded to another Election, and (the Defendant disregarding their Proceedings, as having declared against them, as aforesaid) the Majority fell upon *Austin* the now Plaintiff, who addressing himself to the Ecclesiastical Court to be sworn in, they refused him, (the Defendant's Caveat being still pending). Whereupon the said *Austin* the Plaintiff instituted a Suit, in the Ecclesiastical Court, against the Defendant to take off this Caveat. After a tedious and expensive Litigation of above two Years there (to almost the Ruin of the Defendant) and examining Witnesses on both Sides, that Court sentenced the Defendant duly elected, and decreed him to be admitted and sworn in, and condemned the Plaintiff in Costs; and the Defendant was accordingly admitted and sworn in by the Ecclesiastical Court or Judge; but before his Faculty made out, the Plaintiff appealed to the Court of Arches, and proceeded there till the Cause was ripe for Trial, but then thought fit to drop the Prosecution of that Suit, and to resort to this Court for a Prohibition; and obtained a Rule to shew Cause, why a Prohibition should not go to the Ecclesiastical Court, on Account of their not having Jurisdiction of this Matter, as it concerned a Right to a Temporal Office; and Mr. *Fazakerly* coming now to shew Cause against the Rule, submitted it, that the Ecclesiastical Court had Jurisdiction, but said, admitting they had not, yet the Plaintiff could not move for a Prohibition to stay a  
 Suit

Suit which he himself had begun and instituted; besides he apprehended, that *Jarvis* had a good Right to be admitted, and that the Ecclesiastical Court could not refuse him; and so the Court were of Opinion, in a Case, where a *Mandamus* went to admit a Church-warden, that the Ecclesiastical Judge was but Ministerial in this Case, and was bound to admit the Party in Possession of the *Mandamus*, and that he could make no Return to excuse himself from doing it. Mr. *Strange*, on the other Side, agreed, that the Office of a Parish-Clerk was exercised about Spiritual Matters; but notwithstanding, he insisted, that the Office itself was a Temporal Office; wherefore, he apprehended, the Ecclesiastical Court had no Jurisdiction concerning it, and for this Purpose he cited 2 *Rob. Ab.* 285. in the Case of a Register, and if that was so, he insisted it would be no Objection, that the Plaintiff himself had begun in the Court below; and he said, this Court was of that Opinion in Dr. *Wilmot's* Case, last *Mich.* Term. The Court declared, they were of the same Opinion, in the present Case, and as to what was said, by Mr. *Fazackerly*, concerning the *Mandamus*, they agreed that there was one Case to that Purpose; but said, all the Cases since have been against it; and now they said, it was settled, that the Ecclesiastical Judge may return, that the Party was not elected. Upon which Mr. *Fazackerly* proposed, that the Ecclesiastical Judge should admit *Austin*, as well as he had admitted *Jarvis*, and that the Parties should try the Merits of their Elections in a feigned Issue; which Proposal being agreed to, the Court there-



thereupon ruled *Austin* to receive a Declaration for Money had and received to *Farvis's* Use, and to go to Trial of the Elections, and the Possession was directed to go according to the Verdict, on such Trial. On the Trial, Verdict was for *Farvis*, who accordingly was admitted, and still enjoys the Office having duly qualified himself by taking the Oaths, as a Temporal Officer, in the Court of King's Bench, &c. *as others have done since on this Determination.*

7. Pas. 8. Geo. 2.

Mr. *Lacy* moved for a *Mandamus* to Dr. *Henchman*, to grant a License to one *Trot*, he having been chosen by the Parishioners, into the Office of Parish Clerk, and to this Purpose cited *Mo. 101.* My Lord Ch. Just. said, he did not know that a License was necessary; Mr. Justice *Page* said, that the Ecclesiastical Court claims a Right of granting a License to Surgeons, but he firmly believed they had none; and Mr. Justice *Lee* said, that in the Case of *Speak* and *Borne*, on Demurrer to the Prohibition, the Court were of Opinion, that such License was not necessary. However the Court granted a *Mandamus* to Dr. *Henchman*, requiring him to admit the Clerk. *Parish Clerks by whom to be chosen; their Qualifications, Duty, how to be paid, &c.* See *Mo. 908. Can. 91.*

I clearly think, after so many Adjudications against these Ecclesiastical En-

croachments, as the Clergy's, and particularly Ordinaries, insisting on Parish Clerks, &c. and citing them to take Ordinary Licenses; as what they ought and are compellable *de Jure* to do, is a Matter derogatory to the Prerogative Royal, and to the settled and established Common Law, and prejudicial to the Liberty of the Subject, as well as repugnant to the Oaths taken by all Ordinaries, on their being received into Office; and therefore (*possibly may*) justly challenge a due Resentment, Correction and Restraint.

7. *Sextons*

## 7. Sextons.

1. **T**RIN. 8 Geo. 2. B. R. *Pritchard's Case.*

\* A *Mandamus* was moved for to the Church-Wardens of *St. Mary* in *Chester*, to admit one *Pritchard* to the Office of Sexton, and an Affidavit was produced, that *Pritchard* was duly elected by the Majority of the Inhabitants; but notwithstanding that, the Church-Wardens kept the Keys of the Church, and refused to deliver them, and *Vern.* 143. was cited for the Motion. My Lord Ch. Just. said, that he had indeed known *Mandamus's* granted to restore Persons to the Office of Sexton, but his Lordship said, it did not appear, by the Affidavit in the present Case, that the Church-Wardens were to admit the Sexton; and therefore his Lordship further said, he did not see that this Court could compel them to do it: However *Mandamus* went, that a Return might be made to it.

\* 2. On a Motion for a *Mandamus* to admit a Sexton, the Court asked, whether he came in by Nomination of the Parson, or by Election of the Parish; and though it was allowed that he came in by the Nomination of the Parson; yet a Rule was made to shew Cause. One of the Judges said, in another Case, and I think, it was Mr. Justice Lee, now Lord Ch. Just. that since Lord Holt's Time, *Mandamus's* had been frequent to admit Sextons.

8. Church-Wardens, Sides-Men, &c.  
Vide the Matter XXIII.

1. General to.

1. IF the Church-Wardens of a Church sue in the Ecclesiastical Court *7. S.* for that he, and all those who have been seised of such an House, &c. at the Perambulation of the Parishioners of the Parish, &c. have used to find Refreshment, *scil.* Bread and Services, and to rest themselves there, a Prohibition shall be granted; for that they claim it in Nature of a Corody, and if that should be suffered, great Inconvenience would follow, &c. *Rol. Abr. Prohibition, fo. 287. Case 49.*

2. If a Man be defamed for a Bastard, *per un Meretrice*, and the Church-Wardens of the Church oblige him to give Bond to discharge the Parish, according to the Statute, and hereupon the Party defamed libel in the Ecclesiastical Court against the Church-Wardens for the Defamation, a Prohibition lies. *Mich. 10 Jac. Berrie's Case, Rol. Abr. Prohibition, R. Case 5.*

*Mich. 8 Geo. 2. B. R. Cumberbach v.*

3. A *Mandamus* had been granted to the Archdeacon of ——— to swear in two Persons Church-Wardens, and the Archdeacon swore them in accordingly; notwithstanding which a Suit was instituted in the Ecclesiastical Court of the Bishop of *Litchfield* and *Coventry*, by Way of Appeal, to what the Archdeacon had done, and an Inhibition was granted



granted to the Church-Wardens to prevent their Acting; whereupon Mr. *Strange* moved for a Prohibition, and said, the Church-Wardens were Temporal Officers, and that the swearing them in, by the Archdeacon, was merely a Ministerial Act, and that he had nothing to do with their Election, which is the Reason it has been determined, that *non fuit electus* is not a good Return to such *Mandamus*, he said, that if what the Archdeacon did was Ministerial, he could not conceive, that an Appeal could lie from it, at least, it could not after this Court had interfered by Way of *Mandamus*. Justice *Lee* said, he did not think that a *Mandamus* being granted could make any Difference in the Case; however (absent the Lord Ch. Just.) Rule was to shew Cause in Order that it might be considered, whether the Appeal lay, and now Mr. *Parker* came to shew Cause, and said, that the *Mandamus* being granted could be no Objection to the present Proceeding in the Ecclesiastical Court; because that does not give the Party any Right, but only is a Means of putting him into Possession; the single Question therefore will be, whether the Ecclesiastical Court can inquire into the Right of Election of Church-Wardens or not; and as to that, he did submit it, that Church-Wardens were Spiritual Officers, and in the present Case there is no Pretence to say, that there is any Custom in Dispute concerning the Choice of them, and he, for Authority, cited *Ray. 246* & *1 Mod. 22* & *3 Mod. 69*. Mr. *Strange* argued on the other Side, and agreed, that Sidesmen were Spiritual Officers, they being created

created by Canon, since the Reformation; but Church-Wardens were a Lay Corporation known to the Common Law. In the Case of ——— and *Preston*, *Pas.* 3. of the late King, in the Common Pleas, it appeared that there had been a Suit in the Spiritual Court against a Church-Warden, for not taking the Oath of Office being duly Elected; and upon Debate, the Court granted a Prohibition, he said, he did agree that so far the Archdeacon may inquire into the Manner of the Election of a Church-Warden as to return *Non fuit electus*, (though there has been Authorities to the Contrary, even in that Point) but he submitted it, that the Spiritual Court was never yet allowed to proceed to determine the Right of this Officer to his Election; and thirdly, he submitted it, that there being a *Mandamus* obtained and executed was a Circumstance in Favour of the present Application. My Lord Ch. Just. thought, that the Circumstances of the present *Mandamus* ought to be put out of the Case; for if a *Mandamus* should go to the Spiritual Court, or Judge, to give Judgment, there was no Precedence to say, but an Appeal or Writ of Error would lie, after that the single Question, his Lordship said, would be, whether the Spiritual Court could inquire into the Right of Election of such Officer, and he thought they could not; for a Church-Warden he took to be a Temporal Officer; and therefore his Right might be tried, either upon an Action for a false Return to a *Non fuit electus*, or else in a Consultation. *Page* and *Probin*, Justices, of the same Opinion; but

Lee Justice doubted, as to the Return of *Non fuit electus*, which he inclined to think was a good Return, and that the Ecclesiastical Judge might proceed in this Enquiry; however the Rule was made Absolute, and the Plaintiff directed to declare in Prohibition in three Weeks Time.

Anno 10 Geo. 2. B. R. *Stoughton & Dr. Reynolds.*

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4. The 89 Canon of 1603, which gives Direction about the Choice and Duty of Church-Wardens, &c. does not bind the Laity; but is subject to and controuled by the Custom of particular Parishes, as in *Cro. Jac.* 523. *Cro. Car.* 551, 670. 2 *Roll. Abr.* 287. *Hard.* 378. *Carth.* 118, &c. The Rector, or Vicar, of a Parish has no Right of presiding at the Election of Church-Wardens, or in Vestries, much less, of adjourning them, unless by Custom or Act of Parliament; but this Right is in the Assembly; and though the Vicar had a Right to preside; yet that doth not give him Title or Power to adjourn; for he presides only, as a Speaker. Where the Parson Nominates one Church-Warden, and the Parishioners chose another, or the like, he having nominated his Church-Warden has no Business any longer at the Assembly. *Vide Noy* 123.

2. *Who to chuse.* *Vide Case Stoughton and Dr. Reynolds, supra.*

1. If the Parishioners have used, Time whereof, &c. to elect one Church-Warden and the Vicar another; and then a Canon is made,



made, that the Vicar shall elect both, and he does so accordingly, and the Parishioners elect one, according to their Customs, and the Ordinary disallow him, and establish the two appointed by the Vicar, a Prohibition shall be granted. *Pas. 5 Jac. 1.* The Parishioners of *Rowlden* in *Kent*, adjudged. *Rol. Abr. Prohibition, fo. 287. Case 50, 51.*

2. *Evelin* being elected by the Parishioners of *St. Thomas's*, to be Church-Warden there, with another; the Parson pretending that, by the Canons he had the Nomination of one, named *Hill* to be Church-Warden, and procured *Dr. Clark* the Official, to swear in the said *Hill*, and to refuse *Evelin*; whereupon the Parishioners surmising that they had a Custom within the Parish, Time whereof, &c. to elect both the Church-Wardens, and that the Canon cannot take away their Customs, prayed a Writ to *Dr. Clarke* to admit the Church-Warden, elected by them, and to swear him in, and amove the Church-Warden, elected by the Parson, and a Precedent was shewn in *1 Jac.* where such a Writ was granted, and it was said, there were divers others the like Precedents; and because the Church-Wardens in *London* are, for the greatest Part, Corporations, and Owners of Lands to them devised, the Writ was granted; and the Court (being informed that the said *Hill*, elected Church-Warden by the Parson, sued the said *Evelin*, elected by the Parish, in the Ecclesiastical Court, granted a Prohibition, to the Intent it might be tried, whether there was such Custom, or not. *Cro. Car. 551, 552.*

3. Pas. 1727. B. R. *Thomas Berry & Jackman v. Cross & al.*

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The Plaintiffs were chosen Church-Wardens by the Inhabitants, and the Defendants were chosen by the Occupiers of the Lands in the same Parish; the Plaintiffs had a Custom to support them; the Defendants Common Right; and on these Matters several Sentences had been in the Ecclesiastical Court for the Defendants; whereupon a Prohibition was moved for, and on Question, whether the Custom was properly suggested? To which the Counsel *pro Def.* said, it was true, that in the first Article of the Suggestion, the Plaintiff had alledged all Customs to be triable in the King's Temporal Courts, and in the second and third Article, they had mentioned Custom; but then in the fourth Article, which is the principal one, they had only suggested, that the Inhabitants had a Right to chuse Church-Wardens sole, without, or exclusive of the Outliers. But the Court said, that the Occupiers of Lands have all, of Common Right, equally a Voice in such Elections; and therefore the Inhabitants, sole, could not have such a Right, but by Custom, accordingly the Prohibition went. The Rule is, that in all Cases where, upon the Face of the Proceedings, it appears the Ecclesiastical Courts have no Right, or that they have not used their Right, according to the Rule of the Common Law, a Prohibition goes, after Sentence, and in no other Case. The same Law is of Prohibition to the Admiralty Court. *Vide Hob. 79. 1 Ven. 115. An. 20. b. Salk. 547, 548. Church-Wardens and Sides-Men,*

by

by whom to be chosen, their Duty, &c.  
*Can.* 89, 90.

## 3. *Their Accounts.*

1 *Paſ.* 7 *Geo.* 2. *B. R. Wainright* and  
*Church v. Bradshaw.*

On a Rule to ſhew Cauſe why a Prohibition ſhould not go to the Eccleſiaſtical Court of *Litchfield*, *Mr. Abney* ſaid, this Suit was inſtituted below, in Order to compel the Defendants, who are Church-Wardens, to bring in their Accounts before the Pariſhioners. To this the Defendants pleaded their being a Pariſh Meeting, and that they there delivered in their Accounts of Receipts, Expences and Diſburſements, according to the Ancient Uſage and Cuſtom of the Pariſh, and that the ſaid Accounts were examined and allowed by the Parſon, and a great Majority of the Inhabitants and Pariſhioners there then preſent, according to Law, and that ſuch Inhabitants and Pariſhioners ſubſcribed their Names thereunto. He alſo ſaid, that by the 89 Canon *Anno* 1603, the Eccleſiaſtical Court has Jurisdiction of compelling Church-Wardens to bring in their Accounts before the Parſon and Pariſhioners, and no other Perſon has a Power of allowing thoſe Accounts, but themſelves; however, in the preſent Caſe, the Church-Wardens have pleaded, that their Accounts were allowed by the Inhabitants at large, as well as the Pariſhioners, and the Inhabitants at large have nothing to do in this Matter. *Mr. Strange* and *Mr. Deniſon* (now *Mr. Juſtice*) argued, on the other Side, and ſaid, it was certain, that the

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Ecclesiastical Court could do no more than compel the Church-wardens to bring in their Accounts before the Vestry, and so the Point was determined, on solemn Argument, in the Case of *Hutchins*, Church-warden of *Hammer-smith*, against *Robinson* and *Carew*, *Mich.* the 1st of his present Majesty, and in that of *Hortrey* and *Kendrick*, *Easter Term* last, both which Cases were in the Court of Exchequer; and therefore the single Question must necessarily depend upon the Defendant's Plea: And as to that, it might well be understood, that no other Inhabitants were meant, but those who were Parishioners; and the Court declared their Opinions to be so; and so made the Rule absolute.

\* *Mich.* 8 *Geo.* 2. *B. R.* *Hopkins* & al<sup>s</sup> v. *Kerr* & al<sup>s</sup>.

2. On Appeal to the Court of Arches, in a Suit against the Church-wardens of *St. Botolph without Aldgate*, to compel them to account; the Defendants pleaded, that their Accounts were already settled and adjusted by the Parson and Parishioners at a Vestry; which Plea the Ecclesiastical Judge thought fit to reject, and proceeded to examine the *Items*; whereupon Mr. *Abney* moved for a Prohibition; and contended that the Vestry had a Power to adjust the Accounts by the 89th Canon, *anno* 1603. My Lord Chief Justice said, that it was certain, that the Ecclesiastical Judge might examine into the Truth of the Fact, whether such Accounts were settled by the Vestry, or not; but they could not inquire into the *Items* of that Account, accordingly (*Probyn* Justice absent)

sent) Rule was to shew Cause. And Mr. — applying for Liberty to inspect the Publick Books of the Parish, said, these Motions are common in Informations, in the Nature of a *Quo Warranto*, as soon as a Rule is made to shew Cause; but my Lord Chief Justice said, that this Case differed from that; because here the Prohibition can only issue upon the Face of the Proceedings; wherefore the Motion was denied. Mr. *Marsh* coming now to shew Cause why the Prohibition should not go, he owned, it was set forth in the Plea, that it was usual in this Parish for the Parishioners to nominate the Minister, one of the Church-wardens, and twelve of themselves, to examine into the Accounts of the old Church-wardens, and when they have so examined them, then to lodge them in the Hands of such Church-warden, for one and forty Days, to be restored and in the mean Time inspected by any of the Parishioners; and after the Report of this select Number, is to be confirmed at a Vestry; but this Usage had been no longer than the Year 1733, and then an Order of Vestry was made for this Purpose; but he submitted it, that this Order was, by no Means, binding, or to be called an Adjustment of Church-wardens Accounts, according to the Canon; but the present Case, he said, was much worse; for even this Order had been by no Means complied with; the Defendants only setting forth, by their Plea, that this select Number signed their Accounts, and not that this Signing was confirmed by that Vestry. Mr. *Abney*, on the other Side, argued, that there  
was

was no Pretence for the Ecclesiastical Court to examine into the *Items* of the Account, accordingly the Rule was made absolute, that a Prohibition should go, as to the *Items*, and be, as to the Rest, discharged.

\* 6. *Trin.* 9 *Geo.* 2. C. B. *Griffin* and *Foster*.

This was upon a Libel against Church-wardens to account; they pleaded, that the Accounts were passed before a Vestry, notwithstanding which the Court below sentenced they should pay Part of the Money; whereupon Serjeant *Wynn* moved for a Prohibition, and insisted, it had often been determined, that after such Accounts were passed before the Vestry, they could not be re-examined in the Ecclesiastical Court; and accordingly the Rule was to shew Cause. Serjeant *Chappel*, on shewing Cause, said, no Custom having been pleaded, he conceived, the Ecclesiastical Court had a Right to proceed, which Serjeant *Wynn* denied, saying, it had been often determined expressly to the contrary, and cited the Case of *St. Botolph's* Parish lately in the King's Bench, and he also cited the Case of *Wainwright* and *Bradshawe*, and also *Bullock* and *Dunbar*, but last Term; and accordingly the Rule was made absolute.

#### 4. *Who to present.*

1. The Church-wardens of *Ridgewel* in *Essex* presented to the Arch-deacon, that one *Pannel* was a Railer, and Sower of Discord amongst Neighbours, the Archdeacon thought fit to injoin him Purgation, and the Court awarded a Prohibition; for the Cause belongs



belongs to the Leet, and not to them, except in the Church, or the like. *Hob. 246, 247.*

2. If any offend their Brethren, either by Adultery, Whoredom, Incest, or Drunkenness, or by Swearing, Ribaldry, Usury, or any other Uncleaness, or Wickedness of Life, the Church-wardens, or Questmen and Sidesmen, in their next Presentments, shall present all and every the Offenders, to the Intent they may be punished: And such notorious Offenders are not to be admitted to the Holy Communion, till reformed. *Can.*

*109. Sure, if there be any such, as is more than to be feared, amongst the very Clergy themselves, they ought with much higher Reason to be presented as they act therein, not only against the ordinary Duties of Christianity, but also, as they are therein guilty of the most heinous Perjury, by breaking their solemn Vows and Engagements, made at their several Ordinations, and not only so, but as a stricter Regard to all Sobriety and Religion ought to be paid by them, as Paterns to the Laity; therefore they must needs offend abundantly more by their Vice, as thereby persuading the People, round them, that they themselves do not believe in that Religion they preach to others; and if the Church-wardens, &c. fail in the Duties required of them by this Canon, I conceive, that by the 113 Canon, as well as ex officiis suis, not only Ministers of Parishes, but even Curates are in Conscience bound to present such; and therefore to the Canons aforesaid, and their own Consciences, I refer them: With this further Observation, that I must hold it to be the Duty of all the Clergy, in general, to be most parti-*

*particularly cautious, in their Lives and Conversation, and that they ought particularly to admonish the Church-wardens, &c. with all the Persuasions they are Masters of, to a strict Observance of their Duties, as they would avoid Perjury, and discharge their Consciences to their Neighbours.*

### *5. Their Duty.*

#### *I. As to Strangers Preaching in their Churches.*

1. That the Bishop may understand (if Occasion so require) what Sermons are made in every Church of his Diocese, and who presume to preach without Licence, the Church-wardens and Sidesmen shall see, that the Names of all Preachers which come to their Church from any other Place, be noted in a Book, which they shall have ready for that Purpose; wherein every Preacher shall subscribe his Name, the Day when he preached, and the Name of the Bishop, by whom he had Licence to preach. *Can. 52.*

2. If any Preacher shall in the Pulpit particularly, or namely of Purpose, impugn or confute any Doctrine delivered by any other Preacher in the same Church, or in any Church near adjoining, before he hath acquainted the Bishop of the Diocese therewith, and received Order from him what to do in such Case; because upon such publick Dissenting and Contradicting there may grow much Offence and Disquietness unto the People; the Church-wardens, or Party grieved shall forthwith signify the same to the said Bishop, and not suffer the said Preacher

Preacher any more to occupy that Place which he hath once abused, except he faithfully promise to forbear all such Matter of Contention in the Church, until the Bishop hath taken further Order therein; who shall with all convenient Speed so proceed therein, that publick Satisfaction may be made in the Congregation, where the Offence was given. Provided, that if either of the Parties offending do appeal he shall not be suffered to preach, *pendente lite*. Can. 53.

## 6. *Their Attendance on the Ecclesiastical Courts.*

By Canon, no Ecclesiastical Judge ought to cite any Church-warden to the Court, but so as he may return home again to his own House the same Day. 12 Co. 112.

## 9. *School-Masters.*

### 1. *Whether need the Ordinary's Licence.*

1. If a Man hath a Calling, as a School-Master, &c. which any Layman may follow, by the Common Law, no Canon can restrain him of the Liberty the Law gave him; for the Common Law or the Custom of the Realm cannot be abrogated, but by Act of Parliament; and therefore no Canon, which is *if mean Authority in Comparison of the former*, can possibly do it, not though the same be an Act of what some have weakly called an Act of Ecclesiastical Legislature, and that though ordained by the King's Royal Licence, and after affirmed by his Royal Authority.

*Truly: Reports  
p. 192*



city. 12 Co. 72. See also 2 Inst. 94, 643, 643, 657. Rol. Abr. 454. Mo. 782. A Parson himself exercising the Employment of a School-Master, Head of a College, Minister of an Impropriation, Donative, or Free-Chapel, or other Exemption, is clearly discharged of all Canonical Obedience, as no Party to the Passing of those partial Laws.

2. Pasch. & Hill. 10 & 11 W. 3. Betsham and Barnardiston.

The chief Question was, whether a School-Master might be prosecuted in the Ecclesiastical Court for not bringing his Scholars to Church, contrary to the 79th Canon, anno 1603. And it was the Opinion of Treby Chief Justice, and Powel Just. and the Court, That the School-Master, being a Layman, was not bound by the Canons. 1 Peer Will. fo. 32. Margin. See Salk. 672. Mathews and Burdet's Case.

*Note*; This Doctrine will appear established, past

Contradiction, under the Divisions of *Parish-Clerks, Sextons, Appropriations, or Impropriations, Donatives, Heads of Colleges and Hospitals*, and under this Division, and in several other Parts of this Work; for he must not only be a Clergyman, to be bound, but it must also be in a Matter merely Spiritual, and of Spiritual Cognizance, &c.

3. Cox was libelled against in the Spiritual Court at Exeter, for teaching School *sans* Licence from the Ordinary, and the 14th December 1699, an Order was on Motion, that Cause should be shewn the first Day of next Term why a Prohibition should not go, and in the mean Time, that all Things should stay, which Order had been from Time to Time enlarged to this Day, Term. S. Mich. 1700. when the Attorney General and Dr. Waller moved to discharge the said Order,

der, alledging, that before the Reformation, this was assuredly of Ecclesiastical Jurisdiction; and in Proof cited the 11th Canon of the Counsel of *Lateran*, which Canon (as well as that for making Tithes Parochial) has been received by Custom into this Kingdom, and so made Part of our Ecclesiastical Laws. The Statute 1 *Eliz. c. 1.* having restored the Spiritual Jurisdiction to the Crown, which had been usurped by the Pope; thereupon the Queen immediately set forth Ecclesiastical Injunctions, the 40th whereof is, that no Man shall take upon himself to teach School, but such as is allowed by the Ordinary; the making of which Injunctions by the Ecclesiastical Power of the Crown shews them to be of an Ecclesiastical Nature, and consequently cognizable in the Ecclesiastical Court. It must be admitted, that these Injunctions were not confirmed by any Act of Parliament, but their being referred to and mentioned 5 *El. c. 1.* was an Argument, that the Legislature did approve of them. That in the 12th Year of that Queen the said Injunction, and (*inter al'*) this against Teaching without Licence by the Ordinary, were by the Convocation, then sitting, turned into Canons; that afterwards 23 *Eliz. cap. 1.* was the 1st Statute which prohibited it, since which, two others had followed, 6 *Jac. c. 4.* & 14 *Ca. 2. c. 4.* but none of them tended to destroy the Ecclesiastical Jurisdiction, only by making the Offence punishable in both Courts, gave a Remedy where there was none before. 1 *Jac.* the Convocation met, and reduced all the Canons into one Body,

Body, and then particularly made this Canon, that none should teach School without Licence from the Ordinary; and though it might be difficult to prove, that these Canons were directly confirmed by Act of Parliament, yet there was a Sort of Confirmation of them 4 *Jac.* 1. c. 7. for the Founding and Incorporating a Free Grammar-School at *North-Leeche* in *Com' Gloucester*, whereby the Provost and Scholars in *Queen's in Oxford* were to nominate the School-Master and Usher of the said School, and to make such Ordinances for the Government thereof, as they should see meet, so as the same were not repugnant to the King's Prerogative, to the Laws and Statutes of the Realm, or to any Ecclesiastical Canons, or Constitutions of the Church of *England*. But, on the other Side, it was answered, that there could not be one Canon or Precedent, before the Reformation, cited to prove the keeping School of Ecclesiastical Cognizance; for that supposing the Council of *Lateran* to have been in every Part thereof received in *England*, yet the Canon cited did not prove the Point for which it was produced; that Canon only appointing School-Masters in every Cathedral Church, and such School-Master to be licensed by the Bishop; which was but reasonable, (*viz.*) that he who taught in the Bishop's Church should be approved of by the Bishop. That teaching School was not in the Nature thereof Spiritual, and it would be hard to affirm that it was of Ecclesiastical Jurisdiction or cognizable there by the old Ecclesiastical Laws of the Kingdom, received by

Salk. 672.



common Use, at the same Time that not one single Precedent of any such Law or Usage, before the Reformation, was to be found; and that as to the Canons made since, they did not bind a Lay-man, as *Cox* was suggested to be; because that the Laity are not represented in Convocation, and it was a fundamental Maxim of our Government, that what bound all must be assented to by all; neither could a Reference to the Canons, in a private Act of Parliament, add any greater Weight to them than they had before. That this was a Case which deserved great Consideration, having before been in the other Courts of *Westminster-Hall*, where several Prohibitions had been granted on this very same Point, in Order that it might receive a judicial Determination, but the other Side would never venture to go on, as in the Case *Betsham* and *Barnardiston* in *C. B.* and in *B. R.* *Oldfield's Case*, *Mich. 9 W. 3.* *Chadwick's Case*, *10 W. 3.* *Scorrie's Case*, *Trin. 11 W. 3.* and *12 W. 3.* one *Davison's Case*, *Salk. 105.* who being brought to the Bar, on *Habeas Corp.* it appeared, that he was committed on an *Excom. Cap.* being excommunicated for teaching School, without Licence, and the Court holding it to be a doubtful Point bail'd him during their Consideration thereof; which Practice of the other Courts of *Westminster-Hall* shewed it to be a Matter not fit to be determined on a Motion, but in a judicial Way; but supposing it to have been originally a Spiritual Crime; yet being now made a Temporal one, by several Acts of Parliament, it was thereby drawn from the Spiritual to the

Temporal Jurisdiction. *Lord Keeper Wright*: Both Courts may have a concurrent Jurisdiction, and a Crime may be punishable both in the one and the other. The Canons of a Convocation do not bind the Laity, without an Act of Parliament; but I always was, and still am, of Opinion, that keeping of a School, by the old Laws of England, is of Ecclesiastical Cognizance; and therefore let the Order for a Prohibition be discharged; whereupon it was moved by *Williams*, that this Libel was for Teaching School generally, without shewing what School, and Court Christian could not have Jurisdiction of Writing-Schools, Reading-Schools, Dancing-Schools, &c. To which *Lord Keeper* assented, and granted a Prohibition as to the Teaching of all Schools, excepting Grammar-Schools; which he thought to be of Ecclesiastical Cognizance. i *Peer Will.* 29, 30, 32, 33. See *Baldham and Barnardiston's Case* before, and *Rushworth's Case* following; & qu. for thereby as well as many other Cases, too many to particularize here, the Opinion of *Lord Keeper Wright* seems to be over-ruled, or rather never to have been Law; unless in the Days of Popery there might be such a Jurisdiction exercised here; and if so, it was not a lawful, but an usurped Jurisdiction, and an Inroadment on the Superior Temporal Laws, and Courts, by a pretended Church Authority, no Ways binding upon the Laity; the Canons being Nullities as to them, as they never have been confirmed by Act of Parliament, or otherwise had the Consent of the Laity, to give them a binding Force upon them; for no Law can possibly bind any, who have not assented to

sec p. 327. \*

† 334.

Godwin's Report p. 589.

2<sup>e</sup> Embra

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such

*such Law; the Rule being, that a Law to bind all, must be consented to by all.*

4. Mich. 7 Geo. 2. B. R. The King and The Bishop of *Litchfield* and *Coventry*.

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Mr. *Parker* now Judge obtained a Rule for superseding a Writ of *Mandamus*, directed to the Ordinary, commanding him to grant a License to *Rushworth*, then lately appointed Usher of the free Grammar School of *Coventry*, founded by *John Hale* in H. 8. Time, for the teaching in the said School. He said that by 77 Canon Anno 1603. the Bishop of the Diocese is trusted with these Licenses, and in this Case, he said, he acted Judicially and not Ministerially; and therefore he conceived the present *Mandamus* was not proper; for in Case the Bishop refuse a License, without Reason, the Party may appeal, and of this Opinion the Court was, in the Case *Turton* and *Reynolds*, Mich. 10 W. 3. and in *Policie's* Case afterwards, he said, My Lord *Macclesfield* and *Eyre* and *Powis* Justices inclined to be of Opinion a *Mandamus* would not lie. He said the Business of a Shool-Master is not an Office, but an Employment; but the present Case is not even so strong as that; for *Rushworth* is only appointed Usher; he also observed, that the present School is but a private one, and not a Royal Foundation. Then came Sergeant *Birch* and another Counsel, and moved to discharge this Rule, and said they took it, that it was never yet settled, That an Usher was bound to take a License; and therefore it was proper that the Ordinary should make a Return to this *Mandamus*, that that Point might be fully settled: And if a License was



necessary they conceived a *Mandamus* the proper Remedy to obtain it, and to the Purpose cited 1 *Sid.* 94, 107, 169. 4 *Inst.* 309. 3 *Keb.* 855. *Ven.* 155, 187, 143, 153, 335, and the Serjeant said, that a *Mandamus* had been before moved for against this very Bishop, requiring him to grant a License to one to teach the School of *Broomefield* in *Com. Derby*; indeed it was not granted because the Affidavit, whereon the Motion was made, was not sufficient, but said he took the Opinion of the Court to be, that a *Mandamus* would lie. My Lord Ch. Just. did not think it a clear Point, that a License was necessary in the present Case; and therefore said, that it was proper that a Return should be made in Order that that Point might be settled, but if it was necessary he did not see that a *Mandamus* was the proper Remedy. His Lordship agreed, that the Business of a School-Master was only an Employment; but yet it is a Temporal Employment; and therefore this Court might interfere. In the Case *Coleful* and *Newcombe*, *Mich.* 4. of the Queen, the Opinion of Mr. Justice *Powel* was, that the Court might grant a *Mandamus* in Case of a License for a Preacher by the Stat. 13 and 14 *Char.* 2. 4. and in the Case of *Vincent*, Lecturer of *St. Dunstan's Fleetstreet*; this Court actually did grant a *Mandamus*, for a License to Preach at that Lectureship, though after, for particular Reason, the Rule was discharged; he said, no Instances had been produced that ever an Appeal lay in these Cases: And if a *Mandamus* would lie, in the Case of a School-Master he thought it would,

would, in the Case of an Usher equally. *Lee* Just. said, he remembered *Policie's* Case cited by Mr. *Parker*. *Prat* Just. was strongly of the other Opinion, on the first Argument, and on the second, the other Judges came over to his Opinion, and accordingly the Rule was discharged for superseding the *Mandamus*: And this Matter coming on again *Paf. 7 Geo. 2.* upon the Return Serjeant *Birch* prayed, that a Peremptory *Mandamus* might be granted: The Return, he said, set forth, that there was a Representation drawn up by several Inhabitants of the Town of *Coventry*, setting forth great Immoralities to be in *Rushworth*, and that there were Affidavits charging him with great Misbehaviour, and a Certificate to the same Effect. The Return further set forth certain Articles, *in hæc verba*, exhibited against him in the Bishop's Court for several Spiritual Offences: That a Caveat was entered in Pursuance of them: That *Rushworth* appeared to these Articles, by his Proctor, and that they were now depending against him. 'Twas further alledged, that by one of the Canons in 1603, which was confirmed by the King's Letters Patents on 6 Sep. 20 Jac. 1. it was necessary for every School-Master to take a License from the Bishop, and that the old Canons made before that Time, required the same: That *Rushworth* was a Clergyman; and that for the Reasons above, the Ordinary suspended granting him this License; this Return, the Serjeant submitted, was insufficient; he said, in *Salk. 432* the Law required the most exact certainty in these Returns, but in the present Return it is not set forth, with any

Certainty, what the Purport of the Affidavit was; neither that it was sworn before a competent Authority; and if this was in the Case of an Indictment of Perjury, the setting forth of an Affidavit, in this Manner, would not be sufficient, as is *Lat.* 39, 133. and the same Objection may be made to the Certificate; and as to the Articles against *Rushworth*, he said, that would be no Objection in his Way; for that a Charge can be of no Force against any one till he is convicted upon it; he observed further, that it was not set forth in this Return, that the Bishop ever gave *Rushworth* Notice to appear and answer these Charges: And in the Case of Dr. *Bently*, who was degraded by the University of *Cambridge*, he took the clear Opinion of the Court to be, that in a Suspension, as well as a Degradation, it was necessary that the Party should have an Opportunity to be heard. The objections he submitted, might well be made to shew, that the Cause returned by the Bishop was not sufficient; and were it not that *Rushworth* hath applied for a *Mandamus*, and so had, in some Measure, admitted, that a License was necessary, he could produce many Authorities in the Law, to shew that no License at all was necessary, and for this Purpose he named *1 Vent.* 41. and he said, there were divers others to the same Purpose. Mr. *Parker* argued, on the other Side, and submitted, it was very certain that in these Cases Licenses are necessary. *Stat.* 1 *Jac.* 1. 4, 9. & 13 & 14 *Car.* 2. 4, 8. take Notice of them to be so. In the old Canons, made by the Popes, this is required. *1 Mod.* 3. the



the Case in 1 *Ven.* 41, is reported contrary and the Authority of the 2 *Lev.* 222 is full in Point. The granting such License is a Judicial Act, and may well be compared to a Bishop's refusing to admit a Person to a Living who is presented, and in such Case it is held in 5 *Co.* 57. that no *Mandamus* will lie, and he conceived, that there was the same Reason, in the present Case, that it should not; and in Support of this Opinion cited 1 *Keb.* 5 *Sid.* 40. *Sty.* 457, but supposing it should be said, that the Return, was a full Excuse for the Ordinary's Non-compliance with the Writ: The Return has set forth the Reasons, why the Ordinary at present suspends granting this License: Articles are actually exhibited against the Party, he appears to them, by which he himself takes Notice of them; and till he has acquitted himself of the Charge, it is highly reasonable the License should be suspended; and to shew that such general Returns have been allowed, he cited 5 *Co.* 158. and *Show. Parliament Cases* 88. My Lord Ch. Just. it's said, that the Return set forth the Party applying for the License to be a Clergyman, and his Lordship said, he at present thought it must be admitted, that a License was necessary; because the Canons in 1603 require it; and it must be admitted that they bind the Clergy; but his Lordship also said, he did think they did not bind the Laity; as they never were confirmed by Parliament his Lordship said also, it has not been made to appear that those ancient Canons, which had been mentioned, were ever allowed of by the Courts of Common Law; therefore

he could not see, that by any Canon, it could be made appear, that a Layman could be obliged to take such License; and said, that with Regard to the General Question of taking these Licenses, he thought it very material to be established, that the Laity were not bound to take them by the Canon Law; for if they were, a *Mandamus* could never lie, requiring them to be made to any one particular Person; but an Appeal would be the proper Remedy. If, on the other Hand, this Obligation ariseth from the Stat. Law; though the Ordinary may be, in some Measure, supposed to act Judicially, yet a particular *Mandamus* may be granted; the principal Question therefore in the principal Case resorts to this, whether the Ordinary has not set forth a sufficient Excuse, for refusing to grant this License, at present, and as to that, his Lordship thought, he clearly had; upon Account of the Articles containing a Criminal Charge being exhibited against the Party, he having appeared to them; and that Matter not being yet determined. The rest of the Judges concurring, a Peremptory *Mandamus* was refused; yet the Matter stood over till *Mich.* the 9. of his present Majesty, when the same coming on again, Mr. *Wynne* now Serjeant, argued for *Rushworth*, and said, he should not contend, but that School-Masters are obliged to take Licenses from Bishops, in some particular Cases; but he apprehended, that this Authority of granting Licenses, was only *sub modo*, and that it was only of Ministerial and not Judicial Authority; and if this was so, then he apprehended, that Bishops have no Right

to examine the Qualifications of those to whom they granted them, and to the Purpose cited ——— 200 or 203. 11 H. 4. 47. 20 H. 6. 13. *Stry.* 457. Mr. *Abney* now Judge on the other Side, said, that if *Rusworth* had been a Layman, he should not have contended, that even a License was necessary, but as it's set forth in the Return, that he is a Clergyman, he conceived, that not only a License was necessary, but that the Bishop had a Right to examine his Qualifications before he granted it. And this Distinction between the Laity and Clergy he apprehended was fully warranted: The Canon which requires this License, he said, was one of them in 1603; but those Canons being only confirmed by the King's Letters Patent, he conceived it to be certain, that they bound the Clergy only; but the Clergy, he apprehended, were bound by all of them, whether they related to Ecclesiastical Matters, or not; and for Authority, he cited 1 *Keb.* 5. 2 *Keb.* 538. 2 *Lev.* 222 & *Salk.* 372. My Lord Ch. Just. said, that he thought, that the single Question for the Court to consider was, whether the Matter returned was a sufficient, temporary, Excuse for not granting the License at present; he said, he did not think, that *Rusworth's* being a Clergyman made the Case any ways different from what it would have been if he had been a Layman; for he could not think that the Canons in 1603, made in Convocation, and confirmed by the Crown, without being confirmed by Parliament, bound even the Clergy in any Matter, but in *re Ecclesiastica*; if this were otherwise, his



his Lordship observed, there would be this Consequence, that if a Clergyman were Head of a College, he might be bound in Matters relating to him in that Capacity, and so in any other Temporal Right; he said likewise, that he did not think it material, in the present Case, to consider, whether Bishops have any Jurisdiction to grant Licenses of this Sort in general; for, in the present Case, the *Mandamus* supposes that he has this Power; the *Mandamus* suggesting, that *Rusworth* was duly appointed and chosen Usher of the Free Grammar School, founded by *Thomas Hale* in the Reign of *H. 8.* and that, before his Admission, he ought to be licensed by the Bishop; but whether that License was necessary by the particular Foundation of the School, or by the general Rule of Law, was not material to enter into; but thus much, he said, he did think, that however ministerial the Bishop might be, in granting a License of this Sort; yet he had a Right, in some Measure, of examining into the Qualifications of the Person, to whom he granted this License. And, in the present Case, his Lordship further said, he thought that the Bishop had set forth a sufficient Excuse for not obeying the Writ, in the Manner as he had returned; for the Return set forth, *we further certify that we never utterly refused, but only suspended granting our License, till we should receive Satisfaction touching the Morals and Sufficiency of the Party:* And then the Return set forth some Charges of Immorality in *Rusworth*, others of his Deficiency and Quarreling in the Church and Church.

Church-Yard with his Parishioners, his Excess in Drinking, and his being guilty, or suspected to be guilty of a lew'd Behaviour. And, on the Court's refusing a peremptory *Mandamus*; for this Reason, his Lordship said, they were well warranted by the Case of *Lupton and Wallis*, which was cited on the former Argument. *Page*, Justice said, that he was always of Opinion, that no Canons bound the Clergy, unless confirmed by Parliament, but in Ecclesiastical Matters; but said, there was no Occasion to inquire into that Matter at present; that he intirely agreed with my Lord Ch. Justice. *Lee* Justice said, that in *Salk.* 572. the Foundation of a *Mandamus* going is resolved to be, the requiring the Party to do some Act in Execution of Law; but it never was yet determined, that a *Mandamus* of this Sort lies at all: In the Case of *Turton and Reynolds*, my Lord *Holt*, said, that it does not lie to a Lecturer; but, in another Case, there was the Opinion of a single Judge, that it would lie. Where *Mandamus's* have been applied for, requiring Justices of Peace to grant a License, he said, the Act of granting the License has been looked upon, as discretionary, and for that Reason has been refused; but where such License has been once granted, the Justice cannot, *ad Libitum*, revoke it; and so that Point has been determined. In the present Case, he thought it could not be said, that the Bishop was bound to grant the License, at all Events, and this fully appeared by the Act of Uniformity, 13 & 14 Ch. 2. The only Point remaining then

then to be considered was, whether there  
 'Tis true, the Canon says, None shall  
 teach in Publick Schools, or private  
 House, but such as shall  
 was not a sufficient Excuse returned for not  
 granting the License at present; and said,  
 he was clear of Opinion, that the Excuse  
 returned was sufficient, and accordingly the  
 Rule pronounced by the Court was, that  
 the Return should be allowed.

be allowed by the Bishop of the Diocese, or Ordinary of the Place, under his Hand and Seal, being found meet, as well for his Learning and Dexterity in Teaching, as for sober and honest Conversation, and also for right Understanding of God's true Religion; and also except he shall first subscribe to the first and third Articles simply, and to the two first Clauses of the second Article. *Can. 77.* And Curates, desirous to teach, are to be licensed before others, under the Terms in *Can. 78.* All School-Masters shall teach in *English*, or *Latin*, as the Children are able to bear, the larger, or shorter, Catechism, heretofore, by publick Authority, set forth; and as often as any Sermon shall be upon Holy and Festival Days, within the Parish where they teach, they shall bring their Scholars to the Church where such Sermon shall be made, and there see them quietly and soberly behave themselves, and shall examine them at Times convenient, after their Return, what they have born away of such Sermons. Upon other Days, and at other Times, they shall train them up with such Sentences of Holy Scripture, as shall be most expedient to induce them to all Godliness, and teach them the Grammar, &c. And if any School-Master being licensed, and having subscribed, as aforesaid, shall offend in any of the Premises, or either, speak, write, or teach, against any Thing, whereunto he hath formerly subscribed, (if upon Admonition by the Ordinary he do not amend and reform himself,) let him be suspended from teaching School any longer. *Can. 79.* But yet I conceive, that a School-Master, though he be of the Clergy, is not bound, as a School-Master, by these, or any other, the Canons; for this is a Temporal Employment, though exercised by an Ecclesiastick, and he is *extra* all Ecclesiastical Conusance or Jurisdiction, and only accountable to his natural Visitor, or such other as such natural Visitor has thought fit to put him under the Government of; and I think, I am well supported in this Notion by the preceding, and many other, Cases in the Books.



2. *Not removeable at the Ordinary's Pleasure.*

2. If a Town erect a common School, and make an Allowance to the School-Master, the Bishop may not remove him, and put in another, at his Pleasure; but if he be a Recusant, he may, by the *Stat. 23 Eliz. c. 1. Rol. Abr. Prohibition, F. 7. Mich. 13 Ja.* The Bishop of Carlisle's Case.

3. *As to licensing Dissenters to teach Schools.*

*Hill. 2 Geo. 2. B. R. Dodridge v. Rand & al'.*

Mr. Marsh moved for a Prohibition to the Bishop of Peterborough, to stay Proceedings against one *Dodridge* for keeping an Academy and dissenting Meeting-House at *Northampton*, sans Licence, which the Canons 1603 require. Suggestion was, in the first place, that those Canons do not bind the Laity, and, in the next place, that *Stat. 1 Ja. 1. 4.* hath given a Penalty for this Offence; accordingly he cited *Carth. 464.* Rule to shew Cause. On shewing Cause, Serjeant *Eyre* observed, that two Matters are contained in the Objection, 1st, that the Canons in 1603 do not bind the Laity; and 2dly, that since the Statute requiring a Licence, the Ecclesiastical Courts have no Jurisdiction; but he said, he apprehended, that the Suggestion in both Parts were wrong; and to that Purpose cited 2 *Lev. 222.* However the Court made Rule absolute, and gave the Party to the first Day of next Term to declare.

8. *Mid-*

8. *Midwives, &c. &c. &c.*

A Suit is in the Ecclesiastical Court for exercising the Trade of a Midwife, *sans* Licence *del'* Ordinary, as an Offence against the Canon, a Prohibition lies; for it is no Spiritual Function. *Rot. Abr. Prohibition, Case 44.* 9 Ca. B. R. The Canons do not bind the Laity.

*See p. 322.*

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C.

*Both.*I. *Spoliation.*

Vaugh. 24.

1. **S**poliation is a Suit for the Fruits of a Church, or the Church itself, and is to be sued in the Spiritual Court, and not in the Temporal; and this is a Suit for one Incumbent against another, where they both claim by the same Patron, and the Right of Patronage doth not come in Question; as if a Parson be created a Bishop, and hath a Dispensation to hold his Benefice, after which the Patron presents another, who is instituted and inducted, in such Case the Bishop may have a Spoliation against the Incumbent in the Spiritual Court; for they both claim under the same Patron, and the Right of Patronage is not drawn in Question; and because the other Parson came into the Possession of the Benefice by the Course of the Spiritual Law, namely, by Institution and Induction; so that he hath Colour thereto by the same Spiritual Law; for if he were not instituted and inducted, no Spoliation lieth, but rather Trespass or an Assise of Novel Disseisin, &c. (*which means some other Temporal Remedy*). The Law is the same, where a Parson that is beneficed already accepts another Living with Cure of Value, who is instituted and inducted; in such Case one of them may

may have Spoliation against the other, and then, whether he hath a sufficient Plurality, or not, will necessarily come in Question, and so it is of Deprivation, &c. The Law is the same where the Patron, on Supposition the Clerk is dead, presents another, in which Case the first Clerk, who was supposed dead, may have a Spoliation against the other; and so it is in many other like Cases, whereof see *Fitz. N. B. 36. G. &c. Terms del' Ley, sub hoc Tit. Vide Secular Clergy, where ousted, the Remedy. Vide ante The Matter, Presentation.*

2. If an Husband possessed of Goods, in Right of his Wife, as Administratrix, grants them to *J. S.* and then the Wife dies, and after another Administration is granted to *J. D.* who sues the Grantee of the Goods for a Spoliation in the Ecclesiastical Court, a Prohibition lieth. *Mich. 11 Car. B. R. Clark and Daniel, Rol. Abr. Prohibition, fo. 302. Case 21.*

3. If an Husband possessed of Goods in Right of his Wife as Administratrix, waste them, and the Wife dies; if the Husband be sued in the Spiritual Courts for a Spoliation, or Waste of these Goods, a Prohibition lies. *Mich. 11 Ca. B. R. Clark and Daniel.* Justice *Jones* said, it was so resolved, though the Spiritual Court complained of it to be very hard. *Rol. Abr. Prohibition, fo. 302. Case 22.*

## II. Church and Church Livings.

## 1. By whom founded.

THE King and his Lay Subjects were the Donors of all Benefices to Ecclesiastical Persons; and therefore Church Benefices are called *Eleemosynas Laicorum*. Dav. 81.

## 2. When began, and how may be obtained.

1. *Parochia est Locus in quo degit populus aliqujus Ecclesie.* 5 Co. 67. a.

2. Parochial Right before the Council of Lateran. Cro. Car. 422.

\* 3. A Church may be filled these several Ways, by Presentation, Collation, &c. See Case *Archbishop Armagh v. Le Roy*, before House of Lords, Feb. 1728. and again April 1730.

4. One may come, without Presentation, Institution, or Induction, these several Ways to a Parsonage, or Church Living. 1. By Way of Appropriation. 2. By Way of Union. 3. By Way of Permutation. 4. By Way of *Commendam*; and in past Times, when the Pope usurped Jurisdiction in *England*, there was a fifth Way, by Way of Provision. Dav. 81. b.

3. Whether



## 3. Whether Dignities, or not.

1. **S**OME Promotions are merely Administrations, as Prebendaries and Parsons, and are not Dignities not having Jurisdiction. *Palm. 461. 11 H. 4. So that it would seem it is Jurisdiction which makes a Dignity.*

2. *Beneficium Ecclesiasticum* extendeth not only to Benefices of Churches Parochial, but to Dignities, and other Ecclesiastical Promotions, as to Deaneries, Arch-deaconries, Prebends, &c. and it appeareth in our Books, that Deaneries, Arch-deaconries, Prebends, &c. are Benefices with Cure of Souls; but they are not comprehended under the Name of Benefices with Cure of Souls within the Statute 21 H. 8. by Reason of a special Proviso, which they had been, if no such Proviso had been added, (*viz.*) Deans, Arch-deacons, Chancellors, Treasurers, Chanters, Prebendary, or a Parson, where there is a Vicar endowed. 3 Inst. 155.

## 4. Void or not.

### 1. Where to be tried.

1. **I**F *A.* be presented by *7. S.* to a Benefice, and be admitted, instituted and inducted, and after the King present his Clerk to the same, on a Supposition that *A.* was presented by Simony, and his Clerk is instituted and inducted; whereupon *A.* sues in the Ecclesiastical Court against the King's Clerk, on Supposal that he himself did not come in  
by

by Simony, and therefore prays, that the Superadmission, Institution and Induction, may be repealed; a Prohibition shall be granted for the Clerk of the King, upon his Suggestion, that *A.* was presented by Simony; for now the sole Question betwixt them is, whether the Church was void, or not, at the Time of the King's Presentment, which is only triable by the Temporal Courts. *Trin. 16 Ja. inter Sarison and Bathee, Rol. Abr. Prohibition, 292. M. 1, 2.*

2. If *A.* recover in a *Quare impedit* against the Ordinary and Incumbent, and the Incumbent bring Error, whereon the Judgment is affirmed, and a Writ to the Bishop is granted to *A.* upon which *A.* presents his Clerk to the Bishop, before any actual Removal of the first Incumbent, and his Clerk is admitted and instituted; upon which, the first Incumbent appeals to the Audience for a Superinstitution before that he was removed, a Prohibition shall be granted; for the first Incumbent was removed in Law by the Judgment, though he continued Incumbent, *de facto*, till the last Incumbent was presented, and the last Institution was by Force of the King's Writ; and therefore no Appeal may be of it. *M. 12 Ja. inter Whistler and Singleton* adjudged, and Prohibition granted. *Rol. Abr. Prohibition, 292. M. 3.*

3. Plenarty shall be tried by the Bishop, where the Plenarty is made by Institution; for that Institution is a Spiritual Act; but where there is no Plenarty till Induction, then full, or not, shall be tried, by Verdict of twelve Men, according to the Common Law; for Induction is a Thing notorious,  
and

and shall not be tried by the Ordinary. *Vide* 22 H. 6. 27, &c. And yet in some Cases a Jury shall inquire of Plenarty, as in the principal Case; and in all *Quare impedit*, one of the three Points inquirable is, if the Church be full, or not. 6 Co. 49. a.

## 5. The Profits thereof.

### 1. The Ordinary not to meddle with.

THE Ordinary has nothing to do to intermeddle with the Church, or the Fruits thereof. *Hob.* 316, 317.

### 2. Where to be sued for.

If a Man sues in Court Christian to have an Account for the Profits of a Benefice, a Prohibition lies; for that it belongeth to the Common Law. *Hill.* 3 *Ja.* adjudged. *Rot. Abr. Prohibition*, fo. 293. Case 6. But for Profits taken in Time of Sequestration, *aliter*, Case 7.

## III. Celebration of Divine Service.

BEfore all Sermons, Lectures, and Homilies, the Preachers and Ministers shall move the People to join with them in Prayer, in the Form, or to the Effect, therein mentioned. *Can.* 55. See 5 Co. *De Jure Regis Eccl.* 9. a.

## IV. Parish



IV. *Parish and Parish Churches.*

\* IF an Act of Parliament make a particular District a particular separate and distinct Parish, the Jurisdiction of the Ecclesiastical Court does not attach upon it for this clear Reason, that it was not such immemorially; and still more so, where it is not a Parish Church. *Parish St. John, Clerkenwell, 9 Geo. 2. B. R.*

V. *Sacraments.*1. *Baptism.*1. *Fees for.*

1. SUGGESTION, that by Law, &c. no Person ought to pay any Thing for the Sacrament of Baptism against his Will, a Prohibition was granted. *Lutw. Anderson and Walker's Case.*

2. *Burdeaux*, a French Protestant had his Child baptized at the French Church in the Savoy, and Dr. *Lancaster*, Vicar of St. Martin's, in which Parish it is, together with the Clerk, libelled against him for a Fee of two Shillings and six Pence due to him, and one Shilling the Clerk; a Prohibition was moved for, and *Levinz* urged, this was an Ecclesiastical Fee due by Canon. *Holt C. J.* Nothing can be due, of common Right, and how can a Canon take Money out of Laymen's Pockets. *Lindwood* says, it is Simony to take any Thing for Christening, or Burying,

ing, unless it be a Fee due by Custom ; but then a Custom for any Person to take a Fee for Christening a Child, when he does not christen it, is not good, like the Case in *Hob.* (175, 176.) where one dies in one Parish, and is buried in another, the Parish where he died shall not have a burying Fee. If you have a Right to christen, you should libel for that Right ; but you ought not to have Money for Christening, when you do not. *Salk.* 332.

## 2. *The Lord's Supper.*

A Citizen of *Bristol* had a Country House, and frequently received the Sacrament in the Parish Church in the Country ; likewise he received it frequently at the Cathedral Church in *Bristol*, notwithstanding which he was cited into the Ecclesiastical Court and admonished, and afterwards, for not obeying and receiving in his Parish Church, according to the Monition, he was excommunicated ; though one of the Surrogates of the Court, but the *Sunday* before, had with his own Hand given him the Sacrament, and that, though he there pleaded this, and likewise his receiving in the Country, at his own Parish, they would not allow of it : Upon this Matter appearing to the Court (*B. R.*) a Prohibition went. *Skin.* 101, 176.

## VI. Church Dues.

## 1. For Churching Women.

IN *Banco Regis. Naylor & Scot.*  
 Libel was in the Consistory Court of York, founded upon a Custom, that every one keeping House, and having Children in the Parish should pay Ten Pence *per* Child to the Parson, at the Time the Wife is, or ought to be, Churched; the Counsel apprehended it to be an unreasonable Custom, that the Parson should have Money for doing of nothing, and so moved for a Prohibition; for they said, the proper Way was, if the Wife would not be Churched, at the proper Time, to force her to it by Ecclesiastical Censures; upon which the Court made a Rule to shew Cause; and Mr. Reeve coming to shew Cause upon the above Rule, Mr. Fazakerley said, that, since that Time, they had pleaded below, and denied the Custom; notwithstanding which the Plaintiff in the Ecclesiastical Court was there going on, and said, if the first Matter should go against them, they should move upon this other Footing; and therefore it would a good deal shorten the Business, if the Suggestion was amended by Consent, and made, as he had then opened it; whereupon it was amended by Consent. Then the Plaintiff having declared in Prohibition and Verdict had for the Custom, Mr. Bootle moved in Arrest of Judgment, that the Custom was void, and accordingly the Court ordered Judgment to be



be stayed, till the *Postea* brought in, and the *Postea* being brought in, the Court made a Rule to shew Cause why the Judgment should not be arrested; and Serjeant *Chebbire* and Mr. *Reeve*, who came to shew Cause, said, the Words of the Custom were, that an Housekeeper having Child or Children born in the Parish of *Wakefield* in *Yorkshire*, at the Time of the Churching the Mother, or at the usual Time after her Delivery, when she should be Churched, have, Time out of Mind, paid Ten Pence to the Vicar, for and in Respect of such Churching, or at the usual Time when the Mother of such Child should be churched. To that two great Objections were made, that this Custom is unreasonable in itself and uncertainly set forth: To the first it was observed, that Religion requires a Woman should return Thanks to God, in a publick Manner, for so great a Deliverance; and therefore it is but fit, that he who assists her in such Office should have some Requital: To the other, they said, there are other Cases where these Courts allow the Ecclesiastical Courts to set forth Matters equally uncertain, as in the present Case, even upon Libels upon Customs, and have not granted their Prohibitions, to which Purpose they applied a Case, where a Libel was upon a Custom, that the Farmers of such a Farm have always laid out Eight Shillings, *aut eo circiter*, for Cakes and Ale in the Perambulation, and yet held good; and besides they said, if the Court was in Doubt, whether the Proceedings in the Courts below were usually in so uncertain a Manner, the proper Method

I would

would be to write to them to certify how their Proceedings are there; and to this Purpose they applied a Case, *Palm. 296.* where a Libel was for a Woman not coming to be churched in a Veil; whereupon a Prohibition being moved for, the Court wrote to the Archbishop to certify how the Canons in that Case were, and he certified the Canon to require it: They observed further, that tho' indeed the Woman's Fitness to be churched is unknown to our Courts, yet to those Courts it is well known, and therefore they might well have proceeded upon it below. The Canon Law says, that a Month is a reasonable Time for Women's coming to be churched, after their Deliverance, unless in Case of great Weakness; that Standard is the proper one to regulate this Custom by; and therefore the Court below ought to be allowed to go on in their Proceedings; but the Court said, they were of Opinion, that they were not to consider the Methods by which this Fee might be ascertained, they were only to consider that it was not certain, as it stands upon the Libel; and therefore upon the Libel they ought not to suffer them to proceed; for they observed, according to the other Doctrine, that this Matter may be made right in the future Parts of the Proceedings, they may refuse to grant Prohibitions at any Time; but they said, that the Rule they founded themselves upon was settled in the Case of *Wood and Hicks*, and *Whittle and Offley*, where a *Modus* was set out imperfectly, and they granted a Prohibition. But the Court observed, that the proper Method, in this

Case, would have been for the Plaintiff to set forth in the Libel the proper Time when Women usually are fit to be churched, and then to have averred, that the Defendant's Wife was not churched within that Time. Upon the whole Matter the Court made the Rule absolute for arresting the Judgment. *Vide Salk. 332.*

**2. For Burials.**

**1.** *Edward Topsal*, Clerk, Parson of *St. Botolph without Aldersgate*, and the Church-Wardens of the same libelled in Court Christian against *Sir John Ferrers* Knight, and alledged a Custom within the City of *London*, and especially within that Parish, that if any Person die within that Parish, being Man or Woman, and be carried out of the same Parish and buried elsewhere, that there ought to be paid to the Parson of this Parish, if he be buried elsewhere, in the Chancel so much, and to the Church-Wardens so much, being the Sums that they alledged were by Custom payable to them for such as were buried in their own Chancel, and then alledging, that the Wife of *Sir John Ferrers* died within the Parish, and was carried away and buried in the Chancel of another Church, and so demanded of him the said Sum; whereupon, for *Sir John Ferrers*, a Prohibition was prayed by *Serjeant Harris*, and granted; for that Custom is against Reason, for that he who is no Parishioner, but may pass through the Parish, or lie in an Inn for a Night, should



be forced to be buried there, or to pay as if he were, and so upon the Matter to pay twice for his Burial. *Hob. 175, 176.*

2. Serjeant *Hooper* shewed Cause against a Rule for a Prohibition to the Spiritual Court to stay a Suit there for a customary Fee of Ten Shillings, due to the Dean and Chapter of *Exeter*, for burying in the Cathedral Church; *sed non allocatur*, for no Fee is due for Burial, of Common Right; but where a License is necessary, the Person giving it may stand upon his own Price; and if there be such a Custom it is triable at Common Law. *Vide 3 Keb. 527, 523.* If the Custom be not denied, the Spiritual Court shall proceed; for there is no other Remedy; but if the Custom be denied, a Prohibition shall go; not *propter Defectum Jurisdictionis*, but *Triationis*; and Burials at Common Law ought to be in the Church-Yard, and without Fee. *Salk. 334.*

3. If the Parson of *B.* in *London* libel in the Ecclesiastical Court on a Custom, that if a Parishioner of *B.* die in *B.* and is carried and buried in another Parish in *London*, and there are given to the Parson a Gown, a Pulpit Cloth, and a Pair of Gloves, &c. that the same Things ought to be given to him, a Prohibition lies to try this Custom, if it be denied; for a Custom might be made in the Ecclesiastical Law by a shorter Time than at Common Law. *Trin. 15 Ca. B. R. Cooker Parson of St. Thomas Apostle's & Goale. Prohibition granted. Rol. Abr. Prohibition (N) Case 18. Vide Lutw. Anderson & Walker's Case, which, with the Cases above, seem to me to determine this Demand of the Parson to have a Gown,*

a Gown, &c. and what not, for nothing, to be very unconscionable, especially when it shall be considered, that no Fees are due, of Common Right, for Burial; and if there be a Custom, the Question, I confess, with me is, whether it is not to be feared such Custom may have had it's Foundation in Inroadment on the Ignorance, or Compliance, of the Laity, or an Abuse of Power; for if the Clergy are to be severally paid for Burials, &c. what are the Considerations of Tithes, Glebe Lands, &c. but if they are to be doubly paid for one and the same Duty, and they can make good their Right thereto; tho' I cannot, at present, reconcile that Matter to myself, I will leave it; but, to return to our present Case, to me it would seem very extraordinary to say, because a Man hath done either an Act of real Charity perhaps to a poor needy Parson; or but of Bounty and Generosity, on the most proper Occasion, that for so doing he shall be mulcted or fined at the Will of an unconscionable Priest. In the present Case, what has this Parson done to give him Title to this Gown, &c. why nothing; but notwithstanding he has a Title, and I suppose, thus makes it out; you freely, and of Favour, gave them to one who discharged the Offices of his Function for you, and at your Request; and therefore (which is a most clear, as well as upright Consequence) you shall, of Force, and against your Will, give the same Things to another who has done nothing for them; but endeavours to pick your Pocket, by making so iniquitous a Demand. This Case brings to my Mind a Story, which I firmly believe having several Times heard it from one or more Persons of undoubted Character and Reputation, and is

of a reverend Doctor of our Church, since dead, (tho' he has not been many Tears so) who held a Living in this Town, not inferior, as I have heard, to very many in it: He was a Person eminent for a fine Preacher, and one esteemed as a great Example of Religion and Piety; yet, as none are without Faults, it is to be feared he had a Taint of Avarice; for having a Curate (a young Gentleman, who behaved himself greatly to the Satisfaction of the Parish) at a certain Stipend or Salary of 20 or 30 l. or some other yearly Wages, where it was Part of the Agreement, that the Doctor (as, it seems, is usual in these Cases) should have the Surplice Fees; tho' the Curate did the Duty. This being the Case between the Doctor and his Curate, a young Lady of Fortune and Figure in the Parish, being to be married, and both she and the Gentleman, as well as all the Lady's Family, having an extraordinary Opinion of the Curate, it was resolved that they would be married at this Parish Church, and the young Gentleman, and not the Doctor, should perform the Ceremony, which being done, the Bridegroom made the Curate a Present of a Purse of Guineas, desiring him to pay the Doctor's Fees, and to accept the rest himself; but notwithstanding this was the Case, and the Doctor informed of the whole of it; yet the Doctor very equitably and conscienciously insisted upon the whole, as being the Reward for the Performance of this Office, which the Doctor, by his Art of distinguishing, demonstrated he himself did by his Deputy; and so insisted on the Premium; for the Labourer is worthy of his Hire, which occasioned the Bridegroom's Certificate of his own Act and Intention, which unluckily turned



turned out for this Twig of Divinity against the full grown Doctor; but who carried off the Purse my Memory fails me; but I think the young Gentleman lost his Curacy; so he was Loser, whoever got.

### 3. Baptism. Vide Sacraments.

## VII. Dilapidations.

### 1. Rules.

**M**ELIorem Conditionem Ecclesiæ facere potest Prælati, deteriore nequaquam.  
11 Co. 49. b.

### 2. Where and how punished.

1. **D**ilapidations and Diminutions of Ecclesiastical Livings are Torts, and are *quodammodo* punishable at Law, for the Master, Dean, &c. for Dilapidation and Wast or Diminution of the Revenues of their Houses might be deprived as appears in 29 E. 3. 16. 2 H. 4. 3. 11 H. 6. 20 H. 6. 46. 9 E. 4. 34. 35 E. 1. 1 Co. 72. b.

2. Anno 14 H. 3. Archiepiscopus Dublin fecit finem de 300 Marcis pro de efforestatione forestæ Archiepiscopatus sui. 11 Co. 49 b.

3. If a Bishop or Archdeacon abate and cut down all the Trees which he has, he shall be deposed, as a Dilapidator of his House. 11 Co. 49. b.

4. Prosternant Arbores in Cæmeterio. Vide 11 Co. 49. b.

A a 3

5. Stat.

5. Stat. *ne Rector prosterneret Arbores in Cæmeterio* made Anno 35 E. 1. Anno Domini 1307. Parsons to fall Trees in Church-Yards for Repair of the Chancel, &c. Vide 11 Co. 49. b.

6. The Ecclesiastical Court may punish for Dilapidation. *Watson* Bishop of St. David's Case. *Salk. Rep.* Vide 5 Co. De Ju. Reg. Eccl. 9.

7. In Prohibition the Case appeared to be this; a Vicar lops and cuts down Timber-Trees growing in the Church-Yard; the Church-Wardens hinder him in carrying the same away, and they being in Trial of this Suit, the Church-Wardens Counsel moved for a Prohibition to the Vicar to stay him from felling any more. *Coke* Ch. Just. this is a good Cause of Deprivation, if he fell down Timber-Trees and Wood, this is a Dilapidation, and by the Resolution in Parliament, a Prohibition by Law shall be granted if a Bishop fell down Wood and Timber-Trees, and the whole Court agreed to grant a Prohibition to the Vicar to inhibit him not to make Spoil of the Timber, this being (as it is called in Parliament) the Endowment of the Church. *Coke*, we will also grant a Prohibition to restrain Bishops from felling Wood and Timber-Trees of their Churches, &c. 3 Bulstr. 158. 2 Bulstr. 279. 1 Ro. 86. Mo. 517.

8. It was held in this Case, being the Bishop of *Salisbury's* Case, that if a Bishop, Parson, or other Ecclesiastical Person do cut down Trees upon the Land, save for Reparation of the Ecclesiastical Houses; or do, or suffer to be done, any Dilapidations, that they

they may be punished for the same in the Ecclesiastical Court, and a Prohibition will not lie in the Case, and that the same is a good Cause of Deprivation of them of their Ecclesiastical Livings and Dignities; but yet for such Waste done, they may be also punished at Common Law. (*Vide 2 H. 4. 3.*) *Godb. 259. Case 357.*

9. The Vicar of *Alesbury* in *Devon* had fallen Timber and had not repaired the Church with them, and on Suggestion of this Matter to the Court and that he was about to fell more, a Prohibition was granted by the Court by the Common Law. 31 E. 1. The Bishop of *Durham* fell'd Trees for Iron Works, and a Prohibition was granted in Parliament. It was moved this Term (*Hil. 13 Jac.*) by *Thomas Crew*, that after a Judgment in *Quare impedit* by the King against *Sacker*, and a Writ to the Bishop, *Sacker* continued Possession and wasted the Vicarage-House, and therefore he prayed a Prohibition, *quod fuit concessum per Cur.* for that it is the Dowry of the Church, as Lord *Coke* said, and any Body may bring this Writ against him; for it is the King's Writ. The Prohibition was not to waste. 1 *Roll. Rep.* 335. 3 *Bulst.* 158.

10. Note; By *Coke, C. J.* a Bishop is only to fell Timber for Building, for Fuel, and for his other necessary Occasions. The Woods of a Bishoprick are called the Dowry of the Church, and are always carefully to be preserved, and if he fell and destroy, on Motion to us made, we will grant a Prohibition; and to this Purpose his Lordship said there was a great Case, which concerned



the Bishop of *Durham*, who had divers Coal-Mines, and would have cut down his Timber-Trees for the Maintenance and Up-holding of his Works, and on Motion in Parliament thereupon for the King, Order was thereupon made that the Judges here should grant a Prohibition for the King, and we will here revive this again; for there a Prohibition was so granted, and so we will do in the like Case for the King by the Statute 35 *E. 1.* If a Bishop sell Timber and sell to a Stranger, a Prohibition shall go; the same of a Dean and Chapter. The whole Court agreed with his Lordship therein. 2 *Bulst.* 279. 2 *Roll. Rep.* 335. 2 *Roll. Abr.* 813. *Mo. Rep.* 917. 1 *Roll. Rep.* 199, 252. 3 *Bulst.* 116, 119, 158. 1 *Keb.* 354. 1 *Show.* 353. *Het.* 30. *Far.* 127. *Parl. Ca.* 67. 1 *Vent.* 307, 316, 323. Vide postea *Deprivation.*

### 3. *Who to have Remedy for.*

#### 1. *General.*

1. IF the Parson of a Church will waste the Inheritance of his Church for his own private Use, the Patron may have a Prohibition; for the Patron is seised, as in Right of his Church, and the Glebe is the Dowry of the Church. 11 *Co.* 49. *a.*

2. My Lord *Coke* said, any Body may have this Writ; for it is the King's Writ. 1 *Roll. Rep.* 335. Vide 3 *Bulst.* 158.

2. *Against*

2. *Against whom.*

Agreed by all the Justices, that a Prohibition is awardable against any one pulling down the Houses of any Incumbent, or felling his Trees, or any other Waste. *Mo. fo. 917.*

4. *How to be pleaded.*

**A**T Bury St. Edmund's Assises Lent, 3 Geo. 2. *Pithern and Ellis.* \*

This was in Trespass by a Parson against the Executor of his Predecessor for Dilapidations. Held by the Court, that it was incumbent upon the Plaintiff to prove his declaring his Assent and Consent to the Articles, and taking the Oaths, in as much as he was but compleat Incumbent *February* last, and the Court would not suffer any Proof of his taking the Oaths, but Matter of Record: However the Court said, it was not necessary to prove Institution and Induction, and the Reason of this Distinction is, that in the first Case an Act of Parliament has declared the Church to be void, where these Ceremonies are not performed, in the other, not. The Judge observed further, that even this is not necessary to be proved where the Parson has been in several Years; and this, he said, was the constant Practice in the Exchequer. *Tamen quære of this last Part, since the Act of Parliament vacates the Living for want of these Qualifications, after any Number of Tears, &c.*

VIII. *The Clergy may punish their own Members.*1. *General.*

1. **E**VERY Parson of a Parish ought to be *persona idonea*, as appears by the Words of the Writ of *Quare impedit, quod permittit præsentare idoneam personam*, &c. where *Idonea* includes Ability. 1. In Learning. 2. In Doctrine. 3. In Honesty. 4. In Conversation. 5. In Diligence in his Function; and all this to instruct the People of God in true Religion, good Conversation, and to avoid Contention, &c. 6 Co. 49. *And I submit it, that if so, then Bishops and all Governors of the Church and Churchmen are to visit and inquire into and reform these Defects ex debito, and that it must be at the most important Peril that they omit so essentially necessary a Duty.*

2. Felony or other Capital Crimes are not examinable in the Ecclesiastical Courts, no, not for Purposes examinable even there, as in Case of Deprivation; and therefore they cannot originally examine such a Crime, to prove a Man *Criminosus*, much less when he is so proved in the proper Court, impeach the Sentence in a Court improper; but they may build a Sentence of Deprivation upon such a Conviction, and they are bound by it; and it is dangerous for a Judge Ecclesiastical to come against it. *Hob.*  
121.



3. In a Parliament holden 1 H. 7. (*cap. 4.*) for the more sure and like Reformation of Priests, Clerks, and Religious Men culpable, or by their Demerits openly noised of incontinent living in their Bodies contrary to their Order, it was enacted, ordained, and established, by the Advice and Assent of the Lords Spiritual and Temporal, and Commons in the said Parliament assembled, and by Authority of the same, that it be lawful to all Archbishops and Bishops, and other Ordinaries having Episcopal Jurisdiction, to punish and chastise Priests, Clerks and Religious Men, being within the Bounds of their Jurisdiction, as shall be committed before them, by Excommunication and lawful Proof, requisite by the Law of the Church, of Advowtry, Fornication, Incest, or any other fleshly Incontinency, by committing them to Ward and Prison, there to abide for such Time as shall be thought to their Discretions convenient for the Quality and Quantity of their Trespas: And that none of the said Archbishops, Bishops, or Ordinaries aforesaid, be thereof chargeable of, to, or upon, any Action of false, or wrongful, Imprisonment; but that they be utterly discharged thereof in any of the Cases aforesaid by Virtue of this Act. 5 Co. *De Jure Regis Eccl. 27. b. 28. a.*

4. The Statute 1 H. 7. gives Bishops, &c. Power to commit Priests convicted of any Incontinency to Prison, and that no Bishop, &c. shall be chargeable for so doing in any Action of false Imprisonment. 4 *Inst.* 329.

5. By

5. By the Act 1 *Eliz.* there is reserved to Archbishops and Bishops, &c. and other Ordinaries, *having peculiar Ecclesiastical Jurisdiction*, to inquire, &c. within the Limits of their Jurisdiction, and to punish the same in like Manner, as had then before been used in like Cases by the Queen's Ecclesiastical Laws. 5 *Co. De Jure Regis Eccl.* 6. *b.*

6. *Anno 7 R. 2. Spencer*, Bishop of *Norwich*, and others, punished for receiving of Money, &c. of the *French King*, which drew them without the King's Licence to yield up Castles and Forts in *France* committed to their Custody, punished by Fine and Imprisonment. 3 *Inst.* 144.

7. The Ecclesiastical Court may punish for foreign Orders. *Watson*, Bishop of *St. David's* Case in *Salk.* and *Keb.* 39.

8. The Spiritual Court may punish a Bishop, for any Offence whatsoever, done against the Duty of his Office, as a Bishop, and as it relates to that ; for Ecclesiastical Persons are subject to the Canons; and tho' those of 1640 have been questioned; yet those of 1603 never were; and as the Clergy are under different Rules and Duties, it is reasonable, if any of them offend, in his Ecclesiastical Duty, he should be punished for it in these Courts; and that more so, if it be for a Matter not punishable at Law, and it is reasonable and fit that the Clergy should have a Power to cleanse their own Body from scandalous Members. *Vide Cawdry's Case*, 5 *Co.* 1 *Part*, 6. and *Watson*, Bishop of *St. David's* Case, reported in *Salk.* And as it is reasonable and fit they should thus do, it is unpardonable if they do not use this Power to so  
good

good Purpose; but how much more so must it needs be, if any in Holy Orders, and especially if any Dignitaries, or beneficed Clergy, know, or have any Reason to suspect, within their several Districts, and suffer to continue, without informing their Superiors thereof, any Places of Resort for such wicked Clerks to act their Wickedness in: Sure it must needs redound to the Disparagement of Men of Holy Orders, to the Offence and Endangering the Salvation of the Laity, and to the Dishonour of Religion, to have so necessary a Duty as the Reformation of the wicked Part of the Clergy neglected. What must the World and Enemies to our most happy Establishment in Church say, to see most gross Faults in the Clergy winked at, whilst an inconsiderate Layman, hardly arrived at the State of Man, is to be excommunicated and damned, as far as in them lies, for simple Fornication, bare Solicitation of Chastity, a brawling Word, or a meer Contempt without any previous Crime at all.

9. A Prohibition was moved for to the Spiritual Court *sur Suggestion*, that he was sued for forging Letters of Ordination; but the Fact was, that they sued him there, in order to Deprivation, *quia mere Laicus*, wherefore Court would not grant the Prohibition. 1 Sid. 217. 1 Lev. 138. Same Case.

10. *Watson*, late Bishop of *St. David's*, was taken on an *Excommunicato Capiendo*, and brought into B. R. by *Habeas Corpus*, and pleaded to the Writ, that he was a Lord of Parliament, and moved to be bailed; while the Return was under Consideration, *Powel* said, tho' it had been done, it was in  
their



their Discretion, and contrary to the Statute of *Westminster*; and he did not think it Discretion, in such a Plea, which every Body knew to be false, he being deprived by Commissioners of Delegates (of which *Powel* himself was one) on the Appeal. *Holt Ch. Just.* agreed and said, tho' they could not take Judicial Notice of the Frailty of his Plea; yet it should lead their Discretion, so he was not admitted to Bail. *Salk.* 106. *Far.* 56, 117. The short Case was thus, this Bishop was sued at *Lambeth*, at a Court held there, before the Archbishop of *Canterbury* himself in Person, for *Simony*, and several other Offences, and now he moved for a Prohibition, on Suggestion, that he was cited to *Lambeth*, and not to the Arches, and that before the Archbishop himself, and not his Vicar General, and the Proceeding against him was in Order to a Deprivation. *Et per Cur.* 1. the Archbishop hath a Provincial Power over all his Bishops of his Province, and may hold his Court where he pleases, and may convene before himself and sit Judge himself, and even so may any other Bishop; for the Power of a Chancellor or Vicar General is only delegated, in Ease of the Bishop. 2. That the Spiritual Court might punish for any Offence whatsoever done against the Duty of his Office, as Bishop, and as it relates to that; for Ecclesiastical Persons are subject to the Canons: Indeed those Canons of 1640 have been questioned; but there hath never been any Doubt made as to those of 1603; and as the Clergy are under different Rules and Duties, it is reasonable, if any Ecclesiastick offend in his

his Ecclesiastical Duty, he should be punished for it in those Courts, and that more especially, if it be for a Matter not punishable by Common Law, and it is reasonable and fit the Clergy should have a Power to purge their own Body from scandalous Members. *Cowdry's Case*, 5 Co. 1 Part 6, was remarkable; for he was deprived for Preaching against the Common Prayer; and yet being the first Instance, there was another Punishment appointed by the Statute. *Vide* 31 E. 1. c. 4. 2 Inst. 586. The Ecclesiastical Court may Punish an Ecclesiastical Officer, &c. for Extortion; they may punish for foreign Orders. *Keb.* 39. They may punish Perjury committed in a Spiritual Court and a Matter Spiritual, as Matrimony, but not in a Temporal Matter, as Contract. 3 Cro. 788. Simony is determinable in the Spiritual Courts, but not in B. R. for it was not supposed at the Common Law; and therefore there was no Damages in a *Quare impedit*. 4 Co. 49. b. 3 Inst. 204. Bishop deprived for Dilapidations. A Prohibition being in the Principal Case denied, the Archbishop proceeded to give Sentence of Deprivation; wherefrom the deprived Bishop appealed to the Delegates, suggesting, that by the Common Law the Archbishop alone could not deprive a Bishop; but his Allegations being rejected by the Delegates, he moved B. R. for a Prohibition, suggesting that all Bishops were Barons, and, *inter se*, Peers, *Et quod par in parem imperium non habet*; and that, tho' a Bishop may be censured, yet he cannot be deprived by an Archbishop; because of their Temporalities, which are protected by the Common

Common Law, are concerned; *vide* 14 E. 3. c. 3. but it ought to be done by Convocation (which *Holt* Ch. Just. called a new Fancy of Sir *Barth. Shower's*) or by the Ecclesiastical Commission. *Holt* Lord Ch. Just. and there held, an Archbishop had Power over his Suffragans, and might deprive; that Bishops are co-ordinate, or *Pares*, *Jure Divino*; but not *Jure humano*, otherwise their Institutions would be to no End: And as to their Peerage, it was by Reason of their Barony: That several Abbots sat in the House of Peers in former Times, and it might as well be pretended they were exempted; and therefore could not be deprived: That by the Common Law the Archbishop hath a Metropolitcal Jurisdiction, and Archbishops are over Bishops, as Bishops are over the other Clergy: That his Power was diminished and usurped upon by the *Pope*, but restored to it's Extent by the Stat. H. 8. That by allowing his Power to visit all is admitted; for he who may visit may deprive, as well as censure, these being but several Degrees of Punishment by the 26 H. 8. and 1 Eliz. c. 1. the only Power given to the Ecclesiastical Commissioners was to visit without one Word of Deprivation; yet they were always allowed a Power to deprive; from the Time of H. 2. till H. 8. there hardly is an Instance of Deprivation of a Bishop, and it is true, that before the 17 Car. cap. 11. confirmed by 13 Car. 2. which takes away the Court of High Commission instituted by Queen *Eliz.* the Deprivations that are of Bishops are by the Court of Ecclesiastical Commissioners; but the Reason thereof was only, as that

was



was the easier and shorter Way; but it cannot be questioned, that a Bishop may be deprived for Dilapidations. 2 H. 4. 3 Godb. 259. 3 Bulst. 158. 2 Bulst. 279. 1 Ro. Rep. 86. Mo. 917. And it is as plain, the Law takes no Notice of any other who can deprive him. If Issue be, whether a Parson be deprived or not, the Court must write to the Bishop; and if Issue be, whether a Bishop be deprived, or not, this Court (B. R.) must write to the Archbishop to certify; and to what Purpose should the 23 H. 8. c. 9. against citing out of the Diocese save the Power of the Archbishop over his Bishops if he had no Power. *Vide* to the same Purpose 29 Car. 2. c. 9. 13 Car. 2. c. 11. The Prohibition was denied, and ordered the Suggestion be entered on Record, that the Court might enter their Reasons of Denial. *Et per Holt* Lord Ch. Just. if it be insisted upon a Prohibition cannot be moved for, till the Suggestion be entered on a Roll. Afterwards *Holt*, Ch. Just. said, that the Bishop of *St. David's* moved the House of Lords for a Writ of Error on this Denial, where it was held, no Writ of Error lay. Bishopricks in *England* anciently were donative by the King, and with good Reason; for the King was Patron; he endowed them with those Lands and Baronies, and then the Ceremony was Investiture *per Annulum & Baculum*; the one a Simbol of the Spiritual Marriage with the Church, the other of the Pastoral Care and Charge over *Christ's* Flock. After many Scuffles between the Kings of *England* and the Pope, it was at last settled in King *John's* Time. 1. That the King should suffer a free

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Election; but that that should be founded on his *Conge d'eslier*. 2. That the Bishop should not have his Temporalities, till he had sworn Allegiance to the King; but that Confirmation and Consecration should belong to the Pope, by which Means he gained, in Effect, the Disposal of Bishopricks, till the 25 H. 8. took away the Papal Jurisdiction. Afterwards by 1 E. 6. c. 1. all Bishopricks were made donative; but the 8 Eliz. c. 4. hath restored the Stat. 25 H. 8. and thereby hath made them elective in *England*; but in *Ireland* they are donative, by Letters Patent at this Day. Note, by the Council of *Lateran* and the Decrees of *Alexander* 3d, no Man was to take a Benefice from Lay Hands. Per *Whitlock*. *Witherington* 69. b. per *Doderidge*. That the Original Letter of Agreement is to be found in *Mathew Paris* and *Eadmerus*. Vide 1 Jo. 160. Lat. 37, 233. Palm. 457. The Manner of making a Bishop, as well, in Case of Translation, as mere Creation, is this: When a Bishop dies, the Dean and Chapter certify the King in Chancery, and pray his License to elect; whereupon the King gives his *Conge d'eslire*, and thereupon they elect, and then certify the King, Archbishop, and Party; and then the King by his Letters Patent gives his Royal Assent, and commands the Archbishop to confirm and consecrate him; whereupon the Archbishop examines the Election and the Party, and then confirms the Election and Consecration himself. This is the Manner of Proceeding in Creations, and it holds also in Cases of Translation, save that he is not consecrated; for a Consecration is like an

Ordi-

Ordination, *Character indelibilis*, and suffices for ever. See 1 Jones 100. When a Bishop is translated, the old See is not void by Election, till it be confirmed; for tho' he be elected, the King may not consent, nor the Archbishop confirm, and it is not reasonable he should lose his old, before he gains the new Presentment. 1 Jo. 162. And in Case of Creation, not till Consecration. Per Doderidge, *Withrington* 69. b. As there are four Things required to compleat a Parson, *sc.* Presentation, Admission, Institution, and Induction; so there are four Things analogically requisite in the making a Bishop; Election, which resembles Presentation, Confirmation, which resembles Admission, Consecration, which resembles Institution, and Installation, or *Inthronization*, as in the Case of an Archbishop, which resembles Induction. Per Doderidge, *Withrington* 69. b. — Heretofore when a Bishop was to be translated, there was no Election; for the Rule of the Canon Law was, *Electus non potest elegi*; and because it was pretended he was married to the first Church, which Marriage could not be dissolved, but by the Pope; thereupon Petition was made to the Pope, and upon his Consent the Party was translated; this was said to be by Postulation. *With.* 48. b. *Sed per Cur.* this was an Usurpation and against Law, and restrained by 16 R. 2. & 9 H. 4. c. 8. and Translations are ever by Election, and not by Postulation. (1 Jo. 160.) *Salk.* 134, 135, 136, 137. The Bishop, being thus in Custody in *Newgate*, at another Day prayed an *Habeas Corpus*, and was thereupon brought into



Court, and it appeared by the Return, that the Writ of *Excom. Cap.* was not returnable; and the Court held, 1st, That one taken on a Writ of *Excom. Cap.* cannot come into this Court, but by *Hab. Cor. Faresl.* 56, 117. and if he be brought in before the Writ is returnable, he shall not be allowed to plead to quash the Writ. 2. The Writ of *Excom. Cap.* recites the *Significavit*, which is in Chancery; but the Writ is brought into this Court, and is inrolled here before it goes to the Sheriff, which Inrollment is to inform the Court, that at the Return of the *Excom. Cap.* they may award further Process, as the Case may require. 3. If by the Recital of the *Significavit* it appears that there was no Cause for the Writ the Court of King's Bench may quash it, and the Court of Chancery cannot, tho' the *Significavit* lie there. *Salk.* 294.

## 2. Rules in.

AS the Clergy are under different Rules and Duties it is reasonable, if any Ecclesiastick offend in his Ecclesiastical Duty, he should be punished for it in those Courts, and that more especially, if it be for a Matter not punishable at the Common Law; and it is reasonable and fit the Clergy should have a Power to purge their own Body from scandalous Members. *Watson* Bishop of St. David's Case, *Salk. Rep.*

IX. *Presentation, Admission, Institution and Induction.*1. *Presentation.*1. *The Duties of Ordinaries to Patrons in such Cases.*

1. THE Law presumes, that every Bishop who hath the Cure of Souls of all People within his Diocese, for which he must answer at the last Day at the grand Tribunal (on which Account he ought to watch and keep them against all Hereticks, and Schismatics, and other Ministers of the Devil) will neither do himself nor assent to any Tort to be done to their Patronages, which is of their terrene, or worldly Possessions; but if the Church is litigious, that he will inform himself of the Truth *de Jure Patronatus*, and so do what is right and just.

6 Co. 49. b.

2. The Ordinary hath no Interest in the Church, but an Office only, and he ought

So that the Ordinary is bound in Duty to take no Sides, but to

B b 3

act uprightly between Party and Party, and to enquire of the Right of Patronage, where the Church is litigious, with all possible Impartiality, and that, as he will answer the same, at the grand Tribunal, at the last Day; and as he is in Duty thus bound to do no Wrong himself; so he is also forbidden to suffer any others to do it. The Ordinary has no real Interest in the Church, but a bare Office only; in the Discharge whereof he ought to be found faithful, always abounding in the Work of the Lord, and not exercising himself, as heretofore, from the Books has often been the Case, in Usurpation on the Prerogative of the Crown, and undoubted Rights and Liberties of the Subject. He ought not to take any undue Advantage of any Neglect, neither of the Ignorance of the Laity, nor of his Authority and Power over their Clerks, much less to scheme

and

and contrive to be indifferent to all Patrons, and maintain how to perpe- no Sides. *Hob. 319.*  
trate and effect

such wicked and unjust Usurpations, for which he must one Day give an Account; but on the contrary, he is bound in Conscience to know where his Right and Authority is bounded, and not strain either. And I can make no Sort of Doubt, but he is bound also in Conscience to inform Patrons and others in their several Rights, where he finds them ignorant of them, and that Ignorance, which is not to be presumed, may not be his Plea, neither this Duty shuffled off to his Chancellor, or other Official, I crave Liberty to insist, as the Acts of such Officials are the Acts of the Ordinary, so are their Neglects, also the Neglects of the Ordinary. And as to the Plea of Ignorance, *St. Germain* is most indisputably right, when he, speaking of Ecclesiastical Judges, as all Ordinaries are, says, if they know not what in the particular Case is their Business and Duty to do, they must inform themselves from those who are learned in such Matters, and it will not admit of a Question, but it is also their Duty to know and be acquainted with all such Temporal Laws, as any ways clash or interfere with the Laws Spiritual; for in such Cases, they are to be ruled by the Temporal Laws: And to say, that they need not give themselves this Trouble; for that they judge in their Courts by Officials, or Deputies, who are Gentlemen learned in the Laws of Holy Church, I say, thus to say, is saying nothing, or no more, in Effect, than that they who are to be Guides to others are to be led blindfold by others, and see with other Men's Eyes, and hear with other Men's Ears, and to judge and determine with other Men's Hearts, and according to other Men's Understandings: Sure this is pinning of one Man's Faith on another's Sleeve with a Witness.

## 2. By the Patron.

1. *Though Presentation is a Temporal Act, and performed by a Layman, and, as such, may be thought not so proper to this Division; yet as the same is the first and most essential Step to the introducing an Ecclesiastical Person into a Spiritual Benefice, or Living, and as it must precede Admission and Institution, which are Spiritual Acts done by and to Spiritual Persons, I hold it convenient here to speak to Presentation, previous to Admission, Institution and Induction.*

2. Pre-



2. Presentation is a Temporal Inheritance, and shall descend, as Lands, and shall be Assets, as Lands. *Doct. & Stud. lib. 2. c. 26, 36.*

3. Presentation, *Præsentatio*, is used properly for the Act of the Patron presenting his Clerk to the Ordinary to be instituted in a Benefice, where such Patron hath the Patronage, or Gift thereof, or Right of Nomination, or Appointment of a Clerk to fill such a Church; as in *Blo. Law Dict.* And if the Bishop refuse to give Institution and Induction upon such Presentation, an Action lies; for the Bishop is but a Kind of an Attorney made by Law to do that for the Patron, which it is supposed he would do for himself, were there not some Let or Hindrance; and therefore the Bishop's Collation by Lapse is in the Patron's Right, and for his Turn, and he shall lay it as his Possession. *Hob. 154, 155.*

4 The Patron's Right was never subject to Churchmen, nor their Officers Ecclesiastical. The Act of the Ordinary himself is but in Execution of the Patron's Right, like as the Admittance of a Copyholder; and the King himself, and much more the Ordinary, is only in Trust to provide for the Patron's Neglect, that is, for him, and to his Use, and not otherwise. The King cannot, much less can the Ordinary, transfer this Trust. The Metropolitan, or immediate Ordinary, whoever of them presents by Lapse, is but *negotiorum Gestor*, or Attorney, appointed by Law, to do that for the Patron, it is to be presumed, were there not some Let, he would do for himself;

and therefore it can be no otherwise than in his Right, and is rather an Administration than an Interest. The Patron's Presentment takes place, even after Lapse, against the Ordinary, Metropolitan, or even the King himself, so it be before Presentment on Lapse; and the King can have no Lapse, but where the Ordinary might have had it before. Presentment is the first and most worthy Act, and the Patronage is both granted and pleaded by the Name of *libera dispositio Ecclesiæ*, 14 E. 4. 2. & 7 E. 3. 4. and the *Quare impedit* is *quod permittat presentare ad Ecclesiam*, &c. *quæ vacat* & *ad suam spectat Donationem*, and the Acts of the Ordinary are but in Execution of it. 13 E. 4. 3. 43 E. 3. 11. 11 H. 4. 80. The Patron's Right and Part to the filling of a Church, and making an Incumbent, is *prior tempore* & *potior jure*, both in Time and Dignity; and therefore the Ordinary's Act cannot be good to perfect and finish that Act which the Patron ought to begin. *Hob. Colt and Glover v. Bishop of Coventry and Litchfield's Case.*

5. If a Man present to a Church, he may revoke it, and present another, and if the Bishop will institute the first, a *Quare impedit* lieth against him. *Palm.* 475.

6. Admission, Institution, and Induction, without Presentation, are merely void. *Cro. Fa.* 255.

7. The Patron's Presentation takes place against the Ordinary after Lapse incurred, and before Collation. *Hob.* 152. *Vide* 13 E. 4. 3. 43 E. 3. 11. 11 H. 4. 80.

8. The

8. The Ordinary's Collation by Lapse, or before the Lapse incurred, though it be wrong, doth not displace the Patronage; but shall be said to be done in Right of the very Patron, being nothing but Institution and Induction, which are his Office, as Ordinary, as well upon Presentation as without; though he doth them out of Season, he hath no Meddling with the Church or the Fruits of it. *Hob. 316, 317.*

## 3. By Lapse.

1. When *Quare impedit* is brought against the Disturber and the Bishop, and six Months pass, the Bishop may not collate by Lapse; the same of the Metropolitan; for he shall never present by Lapse, but where the inferior Ordinary might have had Collation by Lapse, and surceases his Time, and herewith agrees *11 H. 4. 8. 6 Co. 52. a.*

2. The Ordinary and King are only in Trust to provide for the Patron's Neglect, and that for him, and to his Use; but this Trust is not transferrable, shall not go to the Executor of Ordinary, but to his Successor. He who presents by Lapse *est negotiorum Gestor*, or Attorney, appointed by Law to do that for the Patron, it is presumed, were there not some Let, he would do for himself; and therefore it is in his Right, and in Pleading the Patron calls it his Presentation. *Hob. 154, 155.*

3. Presentation by Lapse thereof, the Crown maintaining the Right of the true Patron, and does not gain a Patronage against him. *Palm. 311.*

4. If



4. If the Bishop collate to a presentable Living, and his Clerk is inducted, yet it shall not put the rightful Patron out of Possession; for it is no more than a Provision that the Celebration of Divine Service in the mean Time, till the Patron present, be performed; and this belongs to his Office, and therefore does not put the Patron to his *Quare impedit*; but his Presentee ought to be received; and therefore in such Case no Plenarty by Collation could be pleaded against the Patron; for no Plenarty is available in Law against him who hath Right, but only Plenarty by Presentation; and with this agree the Words of the Statute *W. 2. c. 5. Cum aliquis, &c. præsenterit ad aliquam Ecclesiam*; but forasmuch as Bishops will admit and institute Presentees, without informing themselves (as they ought) of the Right of him who presents, many Patrons have lost their Presentments, without any Regard to Infancy, Coverture, &c. wherefore the Statute *W. 2. c. 5.* was made, giving Remedy. *6 Co. 50. a.* See much excellent Matter to this Purpose.

\* 5. Institution and Induction are merely void against the lawful Patron. See Case *Archbishop Armagh v. Attorney General*, on Error, 21 April 1730, before the House of Lords.

6. The King's Turn which accrued to him by his promoting the Incumbent, is satisfied by another's dying in Possession; for after he comes too late; else the Executor of such Incumbent, who so held, tho' by Mistake, yet without Intention of Wrong, might be accountable. See Case *Archbishop Armagh*

*Armagh and Dr. Whaley v. Le Roy*, in the House of Lords, Feb. 1728, and April 1730.

7. *Presentation is the first and most worthy Act*, and the Acts of the Ordinary are but in Execution of it; and therefore the Ordinary's Act cannot perfect and finish that which the Patron ought to begin. *And so it is, as I take it, that Induction and Institution, without Presentation, are, not only, mere Nullities and void, but injurious and unjust Acts; for Collation without Title does not make an Usurpation.*

4. *Where the Right to be tried.*

1. If the Parson of *B.* take a second Benefice, *deins le Stat. sans Dispensation*, whereby the first Benefice is void, which is of the King's Patronage and after *ad uberiores Cautelam & ad tollendum omne dubium*, he obtaineth a new Presentation from the King; and thereupon requires the Bishop to admit and superinstitute him, the Bishop take Time to advise, and in the mean Time the King presents another, who is instituted and inducted, and then the first Parson sues the Bishop for Injustice in the Spiritual Court, a Prohibition shall be granted; for the Spiritual Court may not examine the Right of Presentation. *M. 3 Ja. B. R. William's Case, Rol. Abr. Prohibition, 293. Case 5.*

2. A Clergyman, suing for a Right by Presentation, needs only to prove he is Incumbent. See *Case Archbishop of Armagh and Dr. Whaley against Attorney General*, 21 April 1730, in the House of Lords. Cases cited 6 Co. 29. 2 Cro. 252. and *Hob. 302. pro.*  
2. *Ad-*

2. *Admission.*1. *What.*

**A**Dmission. In Propriety of Speech, Admission is, when the Bishop, upon Examination, admitteth him to be able, and faith, *admitto te habilem*; but sometimes in a more large Sense, *admissus* doth include *institutus* also. *Cujus præsentatus sit admissus, i. e. institutus.* Co. Lit. 344. a. Vide 5 Co. De Jure Regis Eccl. 9.

2. *Who to be admitted.*

1. Forasmuch as the antient Fathers of the Church, led by the Examples of the Apostles, appointed Prayers and Fasts to be used at the solemn ordering of Ministers, and to that Purpose allotted certain Times, in which only Sacred Orders might be given or conferred, we, following their Holy and Religious Examples, do constitute and decree, that no Deacons or Ministers be made or ordained, but only upon the *Sundays* following *Jejunia quatuor temporum*, commonly called *Ember-Weeks*, appointed in antient Time for Prayer and Fasting, purposely for this Cause at their first Institution, and so continued at this Day in the Church of *England*: And that this be done in the Cathedral or Parish Church where the Bishop resideth, and in the Time of Divine Service, in the Presence not only of the Arch-deacon, but of the Dean and two

Preten-



Prebendaries, at the least ; or if there shall happen to be any lawful Cause to be let, or hindred, in the Presence of four other grave Persons, being Masters of Arts, at the least, and allowed for publick Preachers.

*Can. 31.* And none to be ordained both Deacon and Minister the same Day. *Can.*

*32.*

2. No Bishop shall ordain any, but of his own Diocese, unless he be of one of the Universities of this Realm, or bring Letters dimissary from the Bishop of whose Diocese he is, and desiring to be a Deacon is twenty-three Years old, and to be a Priest twenty-four Years complete, and hath taken some Degree in either of the Universities, or at least except he be able to yield an Account of his Faith in *Latin*, according to the Articles of Religion approved in the Synod of the Bishops, &c. *Anno Dom. 1562*, and to confirm the same by sufficient Testimonies out of the Holy Scriptures ; and except moreover he shall exhibit Letters Testimonial of his good Life and Conversation under the Seal of some College of one of the Universities of this Realm, where before he remained, or of three or more grave Ministers, together with the Subscription and Testimony of other credible Persons, who have known his Life and Behaviour by the Space of three Years next before. *Can. 34.*

3. Upon Consideration had of the Statutes 3 R. 2. 7 H. 4. 1 H. 5. Rot. Parl. 6 H. 4. Nu. 48. & 4 H. 6. Nu. 29. if an Alien or Stranger born be presented to a Benefice, the Bishop ought not to admit him, but may lawfully refuse him. 4 Inst. 338. So a Bastard

Bastard cannot be admitted *sans* Dispensation. Vide post *Refusal of Clerks*.

### 3. Institution.

#### 1. What it is, and its Effect.

1. **I**Nstitution is, when the Bishop saith to the Clerk, *instituo te Rectorem talis Ecclesie cum cura animarum, & accipe Curam tuam & meam.* Co. Lit. 344. a. 5 Co. De Ju. Regis Eccl. 9.

2. By Institution, *Ecclesia plena & consultata existit*, against all Persons, except the King; for when the Ordinary, on Examination, admits him able, then he institutes him, and saith, *instituo te ad tale Beneficium, & habere Curam Animarum* of such a Parish, *& accipe Curam tuam & meam.* Vide 3 H. 6. 13. 4 Co. 79. a. Dy. 346.

3. The Bishop to institute in twenty-eight Days. *Can. 95.*

4. No Bishop shall institute any to a Benefice who hath been ordained by any Bishop, except he first shew him his Letters of Ordination, and bring him a sufficient Testimonial of his former good Life and Behaviour, if the Bishop shall require it, and shall appear, upon due Examination, to be worthy of the Ministry. *Can. 39.*

#### 2. Where Admission and Institution may be refused.

The Bishop refused one presented to him for Institution and Induction, because he was an Haunter of Taverns, and a Player at

unlawful

unlawful Games, *ob quod & diversa alia Crimina* he is *Criminosus & non idoneus*, the particular Causes were adjudged not sufficient, for they were not *Mala in se*, but *Mala prohibita*, & *ob quod & diversa alia Crimina*, he was *Criminosus & non idoneus* are too general and uncertain. 5 Co. 58. a. Dy. 254. b. Hob. 296. 2 Rol. Abr. 355. (40, 45.)

#### 4. *Induction.*

##### 1. *What, how performed, and its Effect.*

###### 1. *General.*

1. **T**H<sup>O</sup> *Induction* be a Matter of Temporal Cognizance, and therefore may be thought not to be so properly introduced here, yet as it cannot be properly dealt with, but together with Presentation, Admission and Institution, I have adventured to consider something of it in this Place, and I hope, not with the greatest Impropriety.

2. Induction, *Inductio*, or Leading into, is a giving an Incumbent Livery and Seisin, as it were, of his Church, by leading him into it, and delivering him the Keys of it, by the Arch-deacon, or Bishop's Deputy, and by his ringing one of the Bells. *Blo. Law Dict.*

3. Induction is performed by Delivery of the Ring, or Bell-Rope, to the new instituted Clerk, that he may toll the Bell, &c. to shew he hath taken Possession, &c. and though Institution makes the Parson complete Clerk as to the Cure of Souls; yet, as to the Temporalties, he hath nothing till Induction,



Induction, and so hath no Remedy for any Matter due to his Church till then, &c. and this is triable by Jury, and not by the Ordinary, &c.

4. As to the Temporalties of an Ecclesiastical Benefice, as the Glebe, &c. the Parson hath not the Freehold thereof till Induction. *Vide Hare and Bulkley's Case, Plow. Com. 528. 4 Co. 79. Dy. 346.*

5. Induction is a Thing notorious, and shall not be tried by the Ordinary, &c. 6 Co. 49.

6. The Archdeacon inducts on the Bishop's Mandate, but that, *de communi jure.* Vent. 319.

7. Induction is a Ministerial Act *in jure Episcopi*, and like a Letter of Attorney to deliver Seisin, which cannot be executed but in the Life of him who made it. 1 Vent. 320. Note; *There is a Quære in our Reporter, whether this Judgment was not after reversed in the Exchequer Chamber, as is said in Sir William Jones's Rep. 78, 79.*

## 2. Where triable.

1. If *A.* be instituted and inducted to a Church, and then is sued in the High Commission Court; for that before *B.* was instituted and inducted, and that after he *A.* was superinstituted and inducted, and is to be punished, as an Intruder. *A.* answers, that he knows not that *B.* was instituted and inducted before him; by which he excuses himself of any Crime; a Prohibition shall go; for that they shall not try which of them hath the better Right, after Institution

tion and Induction; but it shall be tried at Law, *Ec. Mich. 16 Car. B. R. Maddox & Chival, Rol. Abr. Prohibition 292, 293. M. 4.*

2. If a Man, presented to the Bishop, on Refusal, sue to the Metropolitan who, after Monition, Citation and Default of the Bishop, admits and institutes the Incumbent; whereupon he is also inducted, and after the Bishop sues *son* double Quarrel, appealing from the said Sentence to the Delegates to disannull the said Admission and Institution, a Prohibition shall be granted; for that, after Induction, the Admission and Institution may not be drawn in Question in the Spiritual Court. *Mich. 12 Jac. Sir Timothy Hutton and The Bishop of Chester, per Cur. Rol. Abr. Prohibition 393. Ca. 10.*

3. If one, pending a *Quare impedit* libel in the Spiritual Court to avoid the Institution of the Clerk of the same Church, after he is inducted, a Prohibition shall go, else he would prevent the *Quare impedit*. *Mich. 14 Jac. Fisher & Chamberlene, Rol. Abr. Prohibition 294. Ca. 12.* So it shall be, if after Induction, where there is no *Quare impedit* pending, if the Suit be to avoid Institution, a Prohibition shall be granted, because, by the Induction, it is become Temporal, which draws the Spiritual to it; for if he should avoid the Institution, he would necessarily avoid the Induction. *Ca. 13.*

4. If I present my Clerk and he is admitted and instituted, and, before Induction, a Caveat is entered by a Stranger into the Spiritual Court, that he may not be inducted; and thereupon an Inhibition is there granted to the Archdeacon, that he do not induct

him; in this Case, a Prohibition shall be granted; because that being instituted, he hath an Inception to the Lay Fee, and the Church is full against all *præter le Roy*; and if this should be suffered, all Trials by *Quare impedit* should be ousted. *Hil. 14 Jac. B. R.* Prohibition granted. *Rol. Abr. 294. Ca. 14.*

5. Induction is a Temporal Act; and triable by the Temporal Law, and is not to be avoided, but by a Suit of *Quare impedit*, or the like, at the Common Law, and not to be undermined by alledging Insufficiency in the Institution in the Ecclesiastical Court; for that Matter may come in Question upon the Trial of the Induction at Common Law, which will not be good, if the Institution was defective; whereupon it was granted; but if this Course might be admitted, they might avoid all Plenaries in the Ecclesiastical Courts, or question them, at least upon Quarrel to the Institution. *Hob. 15.*

### 3. Where delayed.

If a Patron present *A.* his Clerk, to his Church, and the Bishop, by Examination, delay him above two Months, contrary to the last Canons; whereupon *A.* fearing lest a Lapse should incur, sues a *duplex Querela* in the Court of Audience; by which the Bishop is inhibited to present; and after the six Months, the Court of Audience gives Judgment for him, and after the Bishop, notwithstanding collates, and upon this Matter to the Court of King's Bench prays a Prohibition to the Court of Audience, the Prohibition shall be granted; for now, if it be



be a Lapse, the Ecclesiastical Law may not remove him, the Church being full; and if the Bishop be a Disturber, then his Clerk shall be removed, notwithstanding the Ple-nary for six Months before the Writ purchased; for Collation, *sans* Title, does not make an Usurpation; and therefore, *quacun-que via data*, it does not belong to the Ec-clesiastical Law to proceed in the *duplex que-rela*. *Tr. 3 Jac. B. R. inter Palmer & Smith.* Prohibition granted, and Consultation de-nied. *Rol. Abr. Prohibition 294. Case 16.*

## 5. General to Admission, Institu-tion and Induction.

1. *Who may be a Priest, or Deacon, when, where, by whom, and before whom to be ordered, or ordained.*

**V**IDE the Canons to these Purposes, & *postea*, for what may be refused, and before under the Division *Admission*.

2. *The Office of Bishops in these Cases.*  
*Vide ante Presentation, the Duty of Bi-shops to Patrons in such Cases.*

1. If any Bishops shall admit any Person into the Ministry that hath none of the Ti-tles in the said Canon mentioned, he (*such Bishop*) shall keep and maintain him with all Things necessary, till he do prefer him to some Ecclesiastical Living; and if the said Bishop shall refuse so to do he shall be sus-pended by the Archbishop, being assisted by  
C c 2 another

another Bishop, from giving of Orders, by the Space of a Year. *Can. 33.*

2. The Bishop is diligently to examine every Candidate for Orders, in the Presence of those Ministers who shall assist him at the Imposition of Hands; and if he have any lawful Impediment, he is to cause such Ministers carefully to examine every such Person, so to be ordered, provided they, who assist the Bishop in examining and ordering, be of his Cathedral, if conveniently may be had, else other sufficient Proctors of his Diocese, to the Number of three at least, and if any Bishop, or Suffragan, shall admit any to sacred Orders, who is not so qualified and examined, the Archbishop of his Province having Notice thereof, and being assisted therein by one Bishop, shall suspend the said Bishop, or Suffragan, so offending from making either Deacon, or Priest, for the Space of two Years. *Can. 35. I do not doubt a religious Observance is paid to this Canon, and that there are no private Ordinations, &c. contrary to or inconsistent with it.*

### 3. Where to be tried.

1. The Ecclesiastical Courts may try Institution; but the Temporal Courts must try Induction. *Mich. 14 Jac. Fish and Chamberlene, Ro. Abr. Prohibition, fo. 314, 315. (E.) Case 2.*

2. In a *Quare Impedit*, Admission and Institution shall be tried by Certificate of the Ordinary; but Induction shall be tried *per pais*. *Bro. Abr. Trials, 109*; but if the Bishop be Party, Admission and Institution are triable

triable by the Metropolitan ; but Induction and Installation shall be tried *per pais*. Bro. Abr. Trials, 117.

3. Issue upon an Induction was tried *per pais*, and not by the Bishop. Bro. Abr. *Quare impedit*, 54. Trials, 28.

4. In *Quare Impedit*, if the Issue be upon the Admission, Institution and Induction, it shall be tried *per pais*, *ratione de P Induction* ; which is by the Arch-deacon ; *eadem Lex* of Institution and Installation ; for Installation is also by the Archdeacon, which lies in the Notice of the Country ; but where Issue is upon the Admission and Institution only, it shall be tried by the Bishop ; and because the Bishop was Party, it was tried by the Metropolitan, and a Writ made to him accordingly to certify the King's Court. Bro. Abr. Trials, 44. *Vide etiam* 43.

5. Where has been Institution and Induction, if Suit be to avoid Institution, a Frohibition shall be granted ; because by the Induction it is become Temporal, which draws the Spiritual to it ; for if he should avoid Institution, he would necessarily avoid the Induction. Rol. Abr. *Prohibition*, Case 13.

6. If a Man be admitted, instituted and inducted to a Church, and after is sued in the Spiritual Court for the Institution, supposing it was not good ; for that by the Induction the Parson hath the Church, as a Lay Fee ; and forasmuch as the Common Law shall be prefer'd before the Spiritual Law, it draws the Trial of all to it, else *Quare impedit* should be overthrown ; for they, by this Means, might try all Rights of Patronage in the Spiritual Court. Rol.



*Abr. Prohibition, fo. 3. Trin. 15 Ja. B. R. enter Hitchen and Glover, resolve per tout le Cure. Vide Rol. Abr. Prohibition, fo. 4.*

7. If a Man be instituted and inducted, and after is deprived; for that he was instituted contrary to, and against, the Course of the Ecclesiastical Law, this Sentence of Deprivation is void, because it is become a Lay Fee by the Induction. *Rol. Abr. Prohibition, fo. 5. Hutchin and Glover, Trin. 15 Ja. B. R.*

8. Induction is but a Formality, and therefore not to be strictly examined. *Vent. 320.*

9. Sir *Timotby Hutton* brought *Quare impedit* before the Judges of *Lancaster*, where the Truth of the Case was, he had presented *Boothe*, his Clerk, to the Bishop of *Chester*, being Ordinary, who refused him, whereupon he complained to the Archbishop of *York*, who sent his Monition to receive the Clerk within Time, or else to appear before him and answer, who doing neither, the Archbishop received the Clerk, and instituted him, and by his Warrant he was also inducted. Now the Bishop and one *King*, a great Scholar, presented by the King sued in the Delegates on Supposition the Institution by the Archbishop was void, and, by Consequence, meant to avoid the Induction too, as being *sans* Warrant, whereof the Reason was, because the Archbishop did institute, &c. here at *London*, being up in Parliament Time, and they pretended, these Acts of his being then out of the Diocese were Nullities; whereupon Serjeant *Hutton* prayed a Prohibition, and  
this

this Court was of Opinion, that this Suit ought to be prohibited; for since, by Induction, which is a Temporal Act, and triable by Temporal Law, the Church is full, it is not to be avoided, but by a Suit of *Quare impedit*, or the like, at the Common Law, and not to be undermined by alledging Insufficiency in the Institution, in the Court Ecclesiastical; for that may come in Question, upon the Trial of the Induction at Common Law, which will not be good, if the Institution was not good, whereupon it was granted; but if this Course might be allowed, they might avoid all Plenarties in the Ecclesiastical Court, or question them, at least, upon Quarrel to the Institution. But it was said to Serjeant *Hutton*, that he did not pray his Prohibition in Respect of his *Quare impedit* hanging; because, of his own shewing, the *Quare impedit* must abate; for the Church is full of his Presentation; but he must make his Surmise, that the Church being full (*ut supra*) that they seek (*ut supra*) without Mention of the *Quare impedit*; and though this Advowson and Church were in *Lancashire*, and the *Quare impedit* ought there to be brought, and not here, and there also a Prohibition might be had; yet the Opinion was, that Prohibition might be granted also in this Court; because the Title of the Advowson is not hereby questioned; but the Intrusion *sur le* Common Law (whereof this Court hath general Care) is to be restrained: And the Prothonotaries said, that they have commonly Prohibitions into *Chester* upon it. This Act of the Court was complained of

to the King, and he signified his Pleasure, both by Sir *Thomas Lake*, and the Archbishop of *Canterbury*, that he would have a Consultation granted; but we answered his Majesty by Letter, that we could not do it by Law; and it was left, and so it stood. *Hob. 15, 16.*

10. Plenarty, or not, of a Church shall be tried by the Bishop, if the Plenarty was by Institution; for that Institution is a Spiritual Act; but in Case where there is no Plenarty, till Induction, then Full, or not, shall be tried *per pais*; for Induction is a Thing notorious, and shall not be tried by the Bishop. *Vide 22 H. 6. 27, &c.* And yet in some Cases a Jury shall inquire of Plenarty, as in the same Case; and in all *Quare impedit* one of the three Points inquirable is, whether the Church be full or not. *6 Co. 49. a.*

### X. Ability, and Nonability, of Clerks.

#### 1. Where to be tried.

1. **W**HERE the Ordinary refuseth the Clerk for Nonability, which is put in Issue in *Quare impedit*, and the Ordinary is Party, it shall not be tried by him, because a Party, but by the Metropolitan, if the Clerk be alive; but if he be dead, then it shall be tried *per pais*. *Bro. Abr. Trials, 52.*

2. In *Quare impedit*, able, or not able, is triable by the Certificate of the Guardian of



of the Spiritualties of the Archbishoprick ; but if the Clerk be dead, it shall be tried *per patriam*. 2 Bro. Abr. 301. 8.

3. *Quare Impedit* against the Bishop, who saith that he refused the Clerk for Disability, the Plaintiff saith he was able, it shall be tried *per pais* ; for the Clerk is dead. Bro. Abr. *Visue*, 61.

4. Ability of Clerk, where he is dead, is to be tried *per pais*. Skin. 468.

## XI. Refusal of Clerks.

### 1. Wherefore may be.

1. **B** Astard, Villeinage, *Criminosus*, within Age, & *nient* able, are good Causes to refuse a Presentee. Bro. Abr. *Quare Impedit*, 119, 120.

2. If the Presentee was perjured, it was good Cause of Refusal, tho' no Conviction ; so if he hath killed a Man. 2 Rol. Abr. *Presentment*, *Refusal*, Z.

## XII. Ordinaries Licences.

### 1. Whether absolutely and essentially necessary.

1. Where such Clerk hath been licensed before.

1. **D**OCTOR Watson, in his Clergyman's Law, himself allows, that where one licensed before takes Ecclesiastical Preferment

ment in another Diocese, it is not necessary to take another Licence from the Ordinary, in whose Diocese the second Living is. Fol. 147, 174. And so it is of a Donative, which indeed is a much stronger Case, as the Bishop has nothing to do with it, and very little, or rather nothing with the Clerk. See 1 Mod. 90. 3 Salk. 141.

\* 2. Mich. 3 Geo. 2. in Scacc', Price v. Prat & al'.

In this Case the Lord Chief Baron said, that every Curate must take a Licence unless Fellows of Colleges, &c. And Carter Baron said, that no Curate is obliged to take a new Licence upon a bare Translation of a Bishop; and that though this is frequently done, it has been complained of in Parliament.

### XIII. The Subscription of Clerks.

1. **T**HERE are several Statutes directing Subscription to the Articles of the Church after having read them, and also directing what Oaths, and in what Manner, Time, and Places to be taken; but these are Matters so well known, that I need not take much Notice of them in this Place, and therefore the following Cases shall suffice.

2. A Subscription by a Clerk (as to the Canons and Articles of the Church) to all that the Laws and Statutes of the Realm require, is not sufficient; because he is to subscribe

No Person shall hereafter be received into the Ministry, nor, either by In-

stitution or Collation, be admitted to any Ecclesiastical Living, nor suffered to preach, to catechise, or to be a Lecturer, or Reader of Divinity, in

subscribe generally, and not with any Reservation. By Lord Chancellor, the two Chief Justices, and Chief Baron. *Moor*, in either University, or in any Cathedral or Collegiate Church, fo. 783.

City, or Market-Town, Parish Church, Chapel, or in any other Place within this Realm, except he be licensed either by the Archbishop, or by the Bishop of the Diocese, where he is to be placed, under their Hands and Seals, or by one of the two Universities, under their Seal likewise, and except he shall first subscribe to the three Articles (*contained in this Canon*). 1. The King's Supremacy, and that no foreign Prince, Person, Prelate, State or Potentate, shall, or ought to, have any Jurisdiction, Power, Superiority, Preheminence, or Authority Ecclesiastical or Spiritual within his Majesty's Realms, Dominions and Country. 2dly, That the Book of Common Prayer, &c. containeth in it nothing contrary to the Word of God, and that it may lawfully be used; and that he himself will use the Form in the said Book prescribed in publick Prayer and Administration of the Sacraments, and none other. 3dly, That he alloweth the Book of the Articles of Religion, agreed upon by the Archbishops, &c. (*Canon 1562.*) besides the Ratification to be agreeable to the Word of God: And such Person is to subscribe in the precise Form in this Canon prescribed. And if any Bishop shall ordain, admit, or license any as is aforesaid, except he first have subscribed, as aforesaid, shall be suspended from giving Orders and Licences to preach for the Space of twelve Months; but if either of the Universities shall offend therein, they are left to the Danger of the Law, and his Majesty's Censure. *Can. 36, 37.*

If any Minister having subscribed, as aforesaid, shall omit to use the Form, &c. prescribed in the said Book, let him be suspended, and if, after a Month, he do not reform and submit himself, let him be excommunicated, and then, if he shall not submit himself within the Space of another Month, let him be deposed from the Ministry. *Can. 38.* And if a Clergyman is thus to be punished for an Omission, how ought he to be punished for broaching any Antichristian, or Heretical, Notions contrary to the Principles he has avowed and sworn in most solemn Manner, with all his Might to defend and maintain, or for a vicious Life to the Scandal of Religion, and the Loss of Souls; for the Clergy, I hold, must be either the best, or worst of Men, and that there is scarce any Indifferency in the Case, as to others, though there may comparatively amongst themselves be some.



XIV. *When one may be said to be Compleat Incumbent.*

1. *General.*

**V**IDE *Dispensations, in what Time to be, Case 1.*

2. *What Interest he hath in his Benefice.*

1. **E**cclesiastical Offices, as Bishopricks, Deaneries, Rectories, which are instituted for the Government of Holy Church, should continue in Course of perpetual Succession, *usque ad finem Seculi*; and therefore no Man may take such Office in his natural Capacity; but every such Ecclesiastical Officer is a Body Politick *ipso facto*, as a Parson is incorporate by the Common Law. 40 E. 3. 27. So Bishops, Deans, &c. have their Offices in Politick Capacity, and in Course of Succession. *Dav. 45. b.*

2. Whenever the King gives a Bishoprick in *Ireland*, where all Bishopricks are given and granted by the King's Letters Patent, by the *Stat. 2 Eliz. c. 14.* there needs no Limitation of Estate in the Donation, no more than in the Investiture *per annulum & baculum*, made by the antient Kings of *England* before the *Norman Conquest*, and after; for King *John* was the first King, who, by his Charter dated 15th *January Anno 16th* of his Reign, granted Power and Liberty to all Churches, Cathedral and Conventual, in *England* to make Canonical Election of their

their Prelates, *petita prius*, of him, his Heirs and Successors, *Licentia eligendi*, &c. which Charter is found in *Mat. Paris Hist. Mag. Fo.* 253. *Dav. 46. a.*

3. A Bishop, a Dean, &c. may not have an Estate at Will for Years, or Life, or Intail, in his Bishoprick, or Deanary; but they have Estates in Fee in their Hands; but not to them, and their Heirs; but only to them and their Successors. *Davis 45. b.*

4. In the Grant of a Deanary made by the King, there needs no Limitation of Estate, or if a particular Estate be limited, as for Life, or Years, &c. it should be repugnant and contradictory to the Grant; for the Dean may not take the Deanary, other than to him, and his Successors, which is an Estate in Fee; and therefore these Sorts of Limitations are void. *Dav. 46. a.*

5. Also a Deanary, which is Donative, may not be granted for Years, or at Will, by Reason of a very great Inconvenience, which would follow; for that the Freehold of the Lands, which the Dean hath in Right of his Deanary, should be, by this Means, in perpetual Abeyance, which Inconvenience the Law will not endure. *Dav. 46. a.*

6. Another Reason why a Deanary, or Bishoprick may not be granted *pur Vie tantum* is, on Account of another Inconvenience; for a Dean, or a Bishop may have a Writ of Right. *Lit. 143. b.* which Writ may not be brought by him, who hath no more than a bare Estate for Life, and by that Means the Church should be disinherited, and that without Remedy, which the Law will not suffer. *Dav. 46. a.*

7. Tho',

7. Tho', upon Presentation, Institution, and Induction, of a Parson to a Rectory there is no Limitation what Estate the Parson shall have in the Rectory; yet the Law creates his Estate before, and gives to him a Fee *in Jure Ecclesiæ*. Dav. 46. a.

#### XV. How Clerks are privileged.

1. **H**OLY Church shall enjoy her Liberties in Quietness. Stat. 14 E. 3. cap. 1.
2. Priests not to be arrested doing divine Service. Stat. 50 E. 3. 5. Stat. 1 R. 2. 15.
3. Doctor Lee, having Lands within the Level, was made an Expenditor by the Commissioners of Sewers; whereupon he prayed his Writ of Privilege in this Court, and it was granted; for the Register is *Vir militans Deo, non implicetur secularibus negotiis*; and the antient Law is, *quod Clerici non ponantur in Officio*. F. N. B. Clergymen are not to serve in the Wars. 1 Vent. 105. Dr. Lee's Case. 1 Mod. 282. S. C. Vide 1-Lev. 303. 2 Keb. 693.

#### XVI. How restrained.

##### 1. From Secular Concerns.

1. **I**T is enacted, that no Spiritual Person, Secular, or Regular, beneficed with Cure, by Authority of any License, Dispensation, or otherwise, shall take any particular Stipend, or Salary to sing for any Soul; nor have or occupy by himself, or any



any other to his Use, any Parsonage, or Vicarage in farm, nor take any Profit, or Rent thereof, on Forfeiture of forty Shillings a Week, *prout in le Stat.* Provided that no Deanary, Archdeaconry, Chancellorship, Treasurership, Chantryship, or Prebendary, in any Cathedral, or Collegiate Church; nor Parsonage that hath a Vicar endowed, nor any Benefice perpetual appropriate, be taken as comprehended under the Name of Benefice with Cure in any Article in the said Act. Stat. 21 H. 8. cap. 13.

2. No such Spiritual Person of what Estate, Degree, or Condition, shall have, use, or keep by him, or themselves, or to their Use, or Commodity, any Tan-House or Brew-House (other than for their Families) on Pain of Ten Pounds a Month, *prout in le dict. Stat.* save as in the said Statute is provided. Stat. 21 H. 8. cap. 13.

3. Ecclesiasticks are prohibited to traffick, in any Places, in any Cattle, Corn, Lead, Tin, Hides, Leather, Tallow, Fish, Wool, Wood, or any Manner of Victual, or Merchandize, on Forfeiture of treble Value, and such Bargain to be void, save as in the said Act is excepted. Stat. 21 H. 8. cap. 13.

4. No Spiritual Person, Secular, or Regular, shall take to Farm, to himself, or to his Use, by any Manner of Means, any Manors, Lands, Tenements, or other Hereditaments, for Life, Years, or at Will, on Pain of Forfeiture of Ten Pounds for every Month, one Half to the King, the other to every such Person, as will sue for the same, as in the Act is mentioned, and such Leases to be void. 21 H. 8. cap. 13. *Vide 27 H. 8. fo. 21,*

fo. 21, 23. also Serjeant *Ewer's* Read. upon the two first Branches in *Gray's Inn Hall*, Lent Anno 1637. Dy. 27, 28, 358.

5. *Scot* brought Debt against *Laws Clerk* *sur le Stat. 21 H. 8.* the Writ was *Præcipe Will'o Laws quod reddat nobis & Job'i Scot, qui tam pro nobis, quam pro se ipso sequitur, 110l. quas nobis & præfat. Job'i debet, &c.* and declares for taking to Farm six Acres of Land, and holding the same six Months, *per quod Actio, &c.* for 50*l.* The Defendant pleadeth, *quod ipse non debet præfato Job'i qui tam, &c. prædict. 110l. nec aliquem inde Denarium in formâ quâ, &c.* whereupon Issue, and the Jury found, that the Defendant did owe 30*l.* and for the rest, *quod non debet.* *Henden* in Arrest of Judgment, took two Exceptions; 1. That the Verdict expresseth not for which Farm, nor for which of the Months the 30*l.* was due. This Exception was not regarded by the Court; because the Demand and Issue was for 110*l.* in general, tho' it had been more formal to have distinguished it better. 2. Exception was, that the Defendant had not answered the Writ and Declaration; for the Plea ought to have been, as the Demand is, *quod ipse non debet dicto Domino Regi & præfato Job'i qui tam, &c.* which the Court regarded the rather, because the Statute of *Jeofailes* excepts penal Statutes. *Hob. 327, 328.*

6. *Una Ecclesia unius Rectoris*, as one Wife to one Husband; that the Parson should not farm, graze, &c. nor mingle himself with secular Affairs, that might withdraw his Mind. *Hob. 157.*

**XVII. Residence.**

1. **R**esidence and Non-residence, what is;  
*3 Econ. Ma. 540. 6 Co. 21. b.*

2. A Parson or Vicar is called Incumbent, because he is supposed to be resident, and if he is disturbed in his Office, for his Remedy, *vide Stat. 2 3 E. 6. c. 1. also Stat. 1 W 3 M. sess. 1. cap. 18.*

3. By Stat. 21 H. 8. c. 13. None is to procure a License for Non-residence, contrary to the Statute, under the Penalty of 20*l.* for every Time they put such License in Execution.

4. Every Spiritual Person promoted to any Archdeaconry, Deanary, or Dignity, in any Monastery, or Cathedral Church, or other Church Conventual, or Collegiate, or being beneficed with any Parsonage, or Vicarage, shall be personally resident and abide in, at, and upon, his said Dignity, Prebend, or Benefice, or at one of them, at the least; and in Case any such Person keep not Residence at one of his said Dignities, Prebends, or Benefices, &c. but absent himself wilfully by the Space of one Month together, or for two Months, to be accounted at several Times, in any one Year, and make his Residence and Abiding in any other Places by such Time, that then he shall forfeit, for every such Default 10*l.* Sterling, save such as in the said Act are exempted from Residence. Stat. 21 H. 8. cap. 13.

5. A Parson shall be intended by the Law resident upon his Benefice for the Cure of



## Jura Ecclesiastica.

the Souls he hath there ; for a Parson who hath Cure of Souls, and is Non-resident, *non est Dispensator, sed Dissipator, non Speculator, sed Spiculator*; and therefore Non-residence is not to be presumed, *nor countenanced.* 11 Co. 70. b.

6. On special Verdict, it was resolved, that a Parson ought to reside upon his Rectory, upon the Parsonage House, and not in another; tho' within the same Parish; for the Statute doth not only intend for serving the Cure and Hospitality; but also for the Maintenance of the House for Habitation of the Parson, and that, not only for himself, but for his Successors, that they also might maintain Hospitality there: Yet lawful Imprisonment, or Want of a Parsonage House, are good Excuses for Non-residence; for *Impotentia excusat Legem*; and these Cases are excepted out of the Statute by Construction of Law. Sickness also, without Fraud, a good Cause; so if removed, by Advice, for better Air, and for the Recovery of his Health. 6. Co. 21. b. Mo. 540.

7. No Construction can be too liberal to make Parsons reside, and take Care of their Parishes, &c. *Gilb. 230. Ven le Livre.*

**XVIII. How an Incumbent may vacate his Ecclesiastical Benefices.**

**1. By Acceptance of another incompatible without Dispensation, &c.**

**1. General.**

1. **A** Cardinalship at Rome made a Parsonage at *Durham* void. *Palm.* 459.

2. If a Bishop in *England* be made a Cardinal, the Bishoprick becomes void, and the King shall name the Successor; because the Bishoprick is of his Patronage. 4 *Inst.* 357. If an Incumbent be made a Bishop, or accept of another Cure, the first is void. *Vau.* 20, 21.

3. A Bishop taking another Bishoprick, the first is void, by the Consent of the Superior. *Palm.* 462, 464. *Vau.* 21.

4. It was agreed by all, as well Justices, as those at the Bar, that if a Parson, or Dean, in *England*, take a Bishoprick in *Ireland*, that this makes the first Church void, by Cession, and *Whitlock* gave the Reason; for that there is but one Common Law for all the Church. *Nemo potest habere duas Militias, nec duas Dignitates.* It is impossible a Man should be in two Places at the same Time, &c. *Palm.* 458, 469. *Vaug.* 21.

5. A Prebendary made Dean, the Prebend is void, by Cession. 5 *E. 2. Breve* 800 accordant. *Palm.* 461.

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6. A Man having a Benefice with Cure, to the Value of 10*l.* or more, receives another Benefice with Cure, and is inducted into it; now the first is void, *ac si esset per Mortem vel Resignationem*, & hoc per 21 H. 8. Dy. 255. Vau. 21.

7. The Bishoprick of *Man* made a Cession of a Benefice in *England*. *Palm.* 459.

8. A Man, beneficed in the Diocess of *Peterborough*, which was of the Value of 8*l.* or more (and yet is valued in the Records of the Exchequer for First-Fruits and Tenths at 6*l.* a Year only) accepts a Benefice with Cure in the Diocess of *Gloucester*, and is inducted thereto; by this the first is void. *Dy.* 237. *a.* *Vaug.* 21.

9. It is said in *Hob.* if a Man, having a Benefice, take another, *sans Dispensation*, tho' he be not inducted, and so not within the Statute 21 H. 8. yet the Patron of the first Church may take it, as void, and present presently, or may leave it, as full, till Sentence of Deprivation. *Hob.* 166. *Vau.* 21.

10. Upon Issue, *utrum Ecclesia vacavit per mortem*, &c. in *Quare impedit*, the Case was, a Man had a Benefice compatible, and *sans* sufficient Dispensation, took another compatible; but did not subscribe to the Articles of Religion, according to the Statute 13 *Eliz.* and yet was admitted, and instituted, and inducted to the second Benefice. *Quere*, upon the Evidence, if this made the first Benefice void, by the Stat. 21 H. 8. or not. *Et per Opinionem Curie* held, that the first Benefice *vacavit per Mortem*, and not by Reason of taking the second Benefice, and that he was never lawful Parson of it by Force of the Statute



Statute of 13 Eliz. Dy. Last Case. Vide Hob. 168.

11. No Ecclesiastical Person, having a Benefice, with Cure, of 8*l.* a Year, or above, shall accept or take any other with Cure of Souls, and be instituted and inducted in the same; but the first shall be from thence void, and the Patron may from thence present, except as in the Statute is provided. Stat. 21 H. 8. cap. 13.

12. Parson made Bishop, Parsonage void. Palm. 345. 11 H. 4. 60 & 74. Dy. 159. 4 H. 4. 2. 32 H. 6. 5 E. 4. 19. 24 Palm. 348, 349 ——— Bishop what. Palm. 345.

13. Plenarty by Collation is good against another Parson, but not against the Patron. Palm. 346.

14. One, collated to one Benefice, is after collated to another, the first is void. Palm. 346, 347.

15. *Quare impedit ad præsentandum ad Ecclesiam Vicariæ de Ichingstoke*, and makes Title by Stat. 21 H. 8. for that one *Shilston*, being Vicar there, which was a Benefice with Cure above 8*l.* a Year, Anno 15 King Jac. took another Benefice, viz. the Vicarage of *Holcombeburnel in Com. Devon*, being also a Benefice with Cure, and was thereto admitted, instituted, and inducted; so that thereby the first Benefice became void, and so remained two Years, and so Title of Presentation accrued to King *James*, and from him descended to the King that now is, (*King Charles*) and therefore belongs to him to present. The Archbishop claims nothing but as Ordinary; the Defendant pleads and confesseth the King's Title from the Accep-

tance of the second Benefice, whereby the first was void, and so remained 21 *Jac.* and pleads the general Pardon 21 *Jac.* and that *Shilton* was a Person not excepted in the said Pardon, nor the said Cause of Lapse excepted, and that *Shilton*, being the Incumbent, resigned *Ichingstoke*, and gave Title to *Fayle* to present, who presented the Defendant, who was presented, instituted, and inducted before the King's Writ, &c. The Attorney Gen. replies, shewing the Exception in the Pardon, wherein is excepted all Titles and Actions of *Quare impedit*, other than such Actions of *Quare impedit*, which the King had, or might have, *ratione Lapsus*, incurred *ultra* three Years last past, for or concerning any Benefice, whereof any Incumbent then was, or the last Day of the Parliament, should be, in Possession by Presentation of any Patron, or the Collation of any Ordinary; and that the said Church being so void *Fayle* presented, &c. and traverseth, that the said Vicarage of *Ichingstoke* *vacavit per resignationem* of *Shilton*, the Defendant demurred to this Replication, and, after several Arguments at the Bar, and twice at the Bench in *Com. B.* and the Judges being both Times divided, *viz.* *Richardson*, Ch. Just. and *Harvey pro Quer.* and *Hutton* and *Telverton pro Def.* and after Sir Robert Heath, Ch. Just. of the Com. Bench and *Harvey* for the Plaintiff, and *Hutton* and *Vernon* for the Defendant; and afterwards Sir Robert Heath, by Reason of this Difference in Opinions it was adjourned into the Exchequer Chamber, and argued there at the Bar, and after Trial, the Justices of both Benches and Barons

Barons of the Exchequer, viz. Sir Thomas Richardson Ch. Just. of the King's Bench, Sir Robert Heath, Ch. Just. of the Com. Bench, Sir Humphrey Davenport, Ch. Baron, and all the other Justices and Barons, and two main Questions were made. 1. If an Avoidance of a Church, happening and continuing void divers Years, so as the King hath Title to present by Lapse, and the King doth not take Advantage thereof, but dies, whether the succeeding King may take Advantage of the Lapse, or be barred by the Stat. 25 E. 3. cap 1. and that rested only upon the Exposition of the said Statute, the Words whereof are (" And touching Presentments to be made by the King, or his Heirs to any Benefice, in another's Right, by old Titles, the King granteth, that, from henceforth, he, nor any of his Heirs, shall not take Titles to present to any Benefice, in another's Right, of any Time of his Progenitors; nor that any Prelate is bound to receive, &c. but that the King and his Heirs be for ever hereafter clearly barred of all such Presentments, saving always to him and his Heirs all such Presentments in another Right, fallen, or to fall, of all his Time, and of the Time to come.") It was strongly urged at the Bar and Bench both, for the Defendant, that this Statute extends to all the Successors and Heirs of King E. 3. that none of them may present to a Church, in another's Right (as they argued that this Church is) because the King hath not that Title, as to his proper Advowson, but in Right of him, who hath the



Inheritance to any Church which falls in Time of his Progenitors, and the rather, for that in the Abridgment of the Statute in the Book of the Statutes, this Saving is altogether omitted; so they conceived the King was bound by the exprefs Words of the Statute, and that there is not any such Saving; and of this Opinion *Vernon* Just. continued; but *Hutton*, who argued in the Com. Bench for the Defendant, in this Point, that the Title of the King was bound by the Statute, and that he might not have Title to present to a Church, fallen in the Time of his Predecessor, by Reason of his Title of Lapse fallen in the Time of his Predecessor, now changed his Opinion, and all the other Justices and Barons, besides *Vernon*, argued for the Plaintiff in this Point, that the King hath good Title to present by Lapse, incurred in the Time of his Predecessor, and is not restrained by the Stat. 25 *E. 3.* for thereby all Rights and Titles to present in his own Time, until before the Statute, and in his Time after, and all his Heirs, after the Death of *E. 3.* are saved, and it shall not bar the Title which the King had in another's Right, fallen, or to fall, in his own Time, or in the Time of his Heirs; and that there was such a Saving appeared by the Copy out of the Parliament Roll, and by an antient Book in the Exchequer, writ in Parchment, where it is writ with a Saving; and they held that these Words of Old Titles are intended in the Time of the Progenitors of King *E. 3.* and not of any Titles of Presentments to fall in the Time of *E. 3.* or his Heirs, but intended to exclude King *E. 3.* and all his Heirs

Heirs from Titles of Presentation in other's Right, fallen before the Time of that King, whereof any Church was full, and which Title is only another's Right; and that was the exprefs Intent of the Statute, *viz.* to take away the Stat. 14 E. 3. c. 2. in this Point. And *Berkley*, and some of the Justices doubted, whether a Presentment by Lapse should be said to be in another's Right, but only Presentments by Reason of Guardianship and Temporalities in the King's Hands; but all the other Justices agreed, that it shall be said to be in another's Right; for tho' he presents *Ratione Prærogativæ*, yet he presents in Right of the Patron: So it is where one presents, by Reason of a Church being void after Forfeiture for Alienation without License, or for Outlawry, and for that was cited 14 E. 3. *Quare impedit* 54. 22 H. 6. 29. 21 Eliz. Dy. 364, (*which last is denied to be Law*) and for the principal Point, they relied upon 11 H. 4. 7. where it is resolved, 7 H. 4. 25. 18 Eliz. Dy. 347. 7 Co. 28. and many Precedents, where the King makes Title to present by Lapse and Title in another's Right; wherefore for this Point, *Richardson* Ch. Just. (who argued alone one Day) said, it is to be taken for clear Law, that the King hath good Title to present, and the Declaration was good notwithstanding that Objection. The second Question was, if *Shilton* was Incumbent and might resign, whether, by his Resignation, the Church is become void: And that rested upon the Exposition of the Stat. 21 Jac. of the general Pardon, and Stat. 21 H. 8. of Pluralities, whether the Church was absolutely

lutely void, by the Acceptance of a second Benefice, being both with Cure; and if the Pardon unto him, being in Possession, may make him Incumbent? And this Point was argued strongly in the Common Bench by *Telverton* and *Hutton*, and afterwards by *Vernon* and *Hutton*, and by both of them in the Exchequer Chamber for the Defendant, that this Church by *Stat. 21 H. 8.* was not absolutely void *in facto*, but is voidable, quoad the Patron; that he may present by the Statute; but until he presents, the other remains Incumbent; and then, he remaining Incumbent, and for three Years being in Possession of the Church, as Incumbent, until the Pardon *21 Ja.* and the Pardon then coming, he being in Possession, establisheth him in Possession, and continues him Incumbent, and he cannot after be ousted by the King, or any other; and then he is Incumbent until he resign; and therefore his Plea is good; for he is out of the Exception of the Pardon; for he was in for three Years before the Pardon; and therefore they said he remained Incumbent, and that he might plead as Incumbent by the Statute *25 E. 3.* as he pleads here; also he is Incumbent as to all Strangers, but not as to his Patron; for he may present before any Deprivation, tho' a Stranger cannot, because the Church remains full against him; and he is Incumbent, so as to take a Release of any Annuity issuing out of the Parsonage, and is chargeable in an Annuity, and is chargeable to the Payment of Subsidies and Fifteenths; and may have an Action of Debt against any of his Parishioners for not setting out their Tithes; And



And many other Reasons they alledged, and said, that the penning this Statute differs much from the Statute 31 *Eliz.* of Simony, and from 13 *Eliz.* for not reading the Articles; wherefore they concluded, that Judgment ought to be given for the Defendant: But all the other Justices and Barons argued against it, holding that the Church was absolutely void *in facto & jure*, by taking the second Benefice; and that by the express Words of the Statute 21 *H. 8.* for at the Common Law, before the said Statute 21 *H. 8.* by Reason of the Canons and Constitutions Ecclesiastical, the first Church was *in jure* void; so as the Patron might present thereto, if he would; but because it was but an Ecclesiastical Constitution, the Patron was not compellable to take Notice of that Avoidance, until Deprivation and Notice thereof given him; and then, after Deprivation, the Church is void *in facto & jure*, and the Patron, at his Peril, ought to present; and this appears by the Books 9 *E. 3. 2. 5 E. 3. 9. 10 E. 3. 1. 24 E. 3. 30. 11 H. 4. 37. Fitz. N. B. 34. 14 H. 7. 28.* Now by the Statute 21 *H. 8.* it was absolutely void after Admission, Institution and Induction, so it is void *facto & jure*, and the Patron, at his Peril, ought to take Notice thereof, and so present within the six Months; otherwise a Lapse incurs; and that it was void to all Purposes absolutely, appears by the Manner of pleading in this, and all other such Cases; that by the Admission, Institution and Induction to the second Benefice, *prima Ecclesia vacavit de persona* of the Incumbent, & *vacans*  
*conti-*

*continuavit* ; so the Church is absolutely void by the Pleadings and Confession of the Defendant, and this appears by the Books, since the Statute 21 H. 8. that by the Acceptance of a second Benefice, the Church is void *facto & jure*, *quoad* the Patron and all others. 18 Eliz. Dy. 347. 5 Co. 75. *Holland's Case*, and *Digby's Case*, and *lib. 6. fo. 29. Green's Case*, and 23 Eliz. Dy. 377. and *Co. Ent. 368*. And for the Reasons before alledged, on the other Side, *viz.* that he may plead, as Incumbent, that is, because he is admitted by the Writ of the Incumbent, and his pleading, as Incumbent, is not contradicted ; and for the taking of a Release, it is much to be doubted ; and if it be good, it is because he is in Possession, as an Intruder, to whom a Release may be a Discharge of such Things ; and for his being charged with Subsidies, that is, because he hath the Profits, and therefore reasonable he should bear and pay the Charges : And *quoad* his having Debt for not setting out of Tithes, it was denied by all those who argued on the other Side : And as to the Pardon of 21 Jac. all the other Justices and Barons held, that the Pardon doth not help him ; first, because it is no Offence within the Body of the Act ; for it is not any Offence or Contempt against the King. 2dly, Because it never was the Intent of the Pardon to dispense with Pluralities, nor are there any Words therein to make him an Incumbent, or to make a Plenarty of a Church, which was absolutely void. And divers of the Justices and the Chief Baron held, that a special Pardon, after such an abso-

absolute Avoidance, with Words, *that he may retain*, or whatsoever other Words he may have, cannot make him Incumbent. So the general Words in the Pardon shall not enure to make a Dispensation, and the Church being since void, shall not be full without a new Presentation, Admission and Institution. And for the Words in the Exception of the general Pardon, *Of all Tithes and Actions of Quare Impedit, other than such Titles and Actions of Quare Impedit, as have incurred by Lapse, above three Tears before the first Day of this Parliament, whereof any Incumbent is in actual Possession, by any Presentation, or Collation, &c.* the last Parts of this Exception do not extend to the said *Sbilton*; for that extends only to those who are in as Incumbents, (which he is not) and not to those who are in by Usurpation and Wrong, who are removeable by *Quare impedit*: And it was said, that since the Statute 21 H. 8. there have been divers general Pardons, and no Pluralities were ever conceived to be within them; wherefore they concluded, that Judgment should be given for the Plaintiff, and it was adjudged accordingly. *Cro. Car. fo. 354 to 355. inclusive.*

16. Taking of a second Living, or Benefice with Cure, above Value, by the Statute 21 H. 8. makes the first absolutely void *in facto & jure*, and that be the express Words of the Statute; for at Law, before the Statute, by the Canons and Constitutions Ecclesiastical, the first Church was void *in jure*, so as the Patron might present thereto, if he would; but because it was but an Ecclesiastical Constitution, the Patron

was



was not compellable to take Notice of the Avoidance, till Deprivation, and Notice given him ; but, after Deprivation, the Church is void *in facto & jure*, and the Patron, at his Peril ought to present ; and this appears by the Books 9 E. 3. 2. 5 E. 3. 9. 10 E. 3. 1. 24 E. 3. 30. 11 H. 4. 37. Fitz. N. B. 34. 14 H. 7. 28. But now by this Statute of 21 H. 8. it is made absolutely void after Admission, Institution and Induction ; so it is void *facto & jure*, and the Patron is to take Notice, at his Peril ; (and it is void to all Men, as it appears by the Books 18 Eliz. Dy. 347. 4 Co. 75 & 78. 6 Co. 29. Dy. 377. Co. Ent. 368.) Cro. Car. 357.

17. A Church may be vacated by Cession, or Incumbent's becoming a Bishop. See Case *Archbishop Armagh v. Attorney General*, in the House of Lords, 21 April 1730.

## 2. The Patron's Right to present in such Cases.

A Parson beneficed in a Living above Value, taking another Benefice, both being with Cure, *sans Dispensation*, the first is void ; yet, as is said in Dy. 255, 129. the Ordinary is not bound to give Notice of this Avoidance, of which the Patron may take Notice, as well as the Ordinary, being by Act of Parliament, whereof every one is to take Notice ; *but quære if this Case is not over-ruled, if the Law ever was so, by subsequent Cases, where it has been adjudged, that the Patron may, at his Pleasure in such*

*Case, take the Church as void, and present instantly, or consider it as full, and so leave it till Sentence of Deprivation be formally pronounced. Vide Fitz. N. B. 34. L. Dy. 377. Hob. 166, 168. 6 Co. 29. 30. 4 Co. Hol-land's Case, and Digby's Case. Vaugh. 131.*

**XIX. Wherefore a Clerk may be removed.**

1. **L**ecturer removed for not officiating in Person, as the Foundation required. See *Phillips and Walter*, in House of Lords, anno 1720. See 2 *Chan. Ca.* 19.

2. In the Exchequer, the Chief Baron said, that all Curates are, at Common Law, removeable at Pleasure, though by the Ecclesiastical Law, they are for Life. *Price* against *Pratt and others*, *Mich.* 3 *Geo.* 2.

**XX. Deprivation.**

**1. What it is.**

1. **D**eprivation is, when an Abbot, Bishop, Parson, Vicar, Prebendary, &c. is deprived, or deposed, from his Pre-ferment, for any Matter in Fact, or in Law; as if a Miscreant or Schismatick be presented, admitted, and inducted, there is good Cause of Deprivation, &c. *Terms de l' Ley*, Title *Deprivation*.

2. Deprivation, *Deprivatio*, a Depriving, Bereaving, or Taking away, with the Loss or Deprivation of all the Spiritual Promotions,

tions, whereof, &c. as of Bishops and Deans,  
&c. *Blount's Law Dict.* Tit. *Deprivation.*

## 2. The Sorts.

1. **D***eprivatio a Beneficio* is, when for some great Crime a Minister is wholly, or for ever, deprived of his Living.

2. *Deprivatio ab officio* is, when a Minister is deprived of his Orders, which is also called *Depositio*, or *Degradatio*, and is commonly for some heinous Crime, meriting Death, and is performed by the Bishop in solemn Manner. In *Godb.* is Mention made of a Bishop deprived for Miscreancy. See *Bellewe*, fo. 194. & 3 *Inst.* 43.

3. *Wherefore one may be deprived, and who must do it, and in what Cases.*

1. **T***HEY* may build a Sentence of Deprivation upon a Conviction of Felony or other Capital Crime; for such they are bound by. *Hob.* 121.

2. *Per generale Concilium Lattarense tentum sub Innocentio, Papa, tertio, statutum est quod quicumque receperit aliquod Beneficium habens Curam Animarum annexam, si prius tale Beneficium obtinebat, eo sit jure ipso privatus, & si forte illud retinere contenderit, alio etiam spoliatur: Is quodque ad quem Prioris spectat Donatio, illud post receptionem alterius conferat cui merito viderit conferendum, which Council was held Anno Dom. 1215.* By



which it appears, that by taking a second Benefice the first is void *ipso jure*, and the Patron may present, and on this general Council are the Books 9 E. 3. 22. 10 E. 3. 1. (where the Council is mentioned) 24 E. 3. 30. a. 11 H. 4. 37. 14 H. 7. 28. 14 H. 8. 17. Fitz. N. B. 27. L. 4 Co. 79. a. Dy. 346. a. b.

3. Regularly the Ordinary, at Common Law, had no Power over a Clergyman, in a Crime or Offence touching the Crown, but where that Power was given him by the Common Law. *Hob. 290.* And therefore when the King's Court did deliver the Offender to the Ordinary, it implied a Power or Permission of the Law, that he might deal with him, to commit, or discharge, him according to the Form of their Laws; but since the Statute hath forbid the Delivery of him, to the Ordinary, it retains all Power to itself, and denies the Ordinary's; and therefore if the Ordinary, at Common Law, would have convened a Churchman to have deprived or degraded him for Felony, before his Trial at Common Law, a Prohibition would have lain for holding a Plea of a Cause of the Crown, and prejudging the King's Court *in eadem.* *Hob. 290.*

4. If a Clerk were found Not guilty of Felony, and discharged, and the Ordinary would convene him again, and admit new Proof to find him guilty, in Order to deprive him, a Prohibition shall go; or if a Clerk delivered *absque Purgatione* to the Ordinary, they would admit him to his Purgation, a Prohibition lieth, yea, and a *Præ-*

*munire* too ; and yet these Offences are not so highly Pleas of the Crown, as in Criminal Causes, there are Degrees, as Treason, and some even against the Person of the King himself. Also if they would proceed between Conviction and Clergy, a Prohibition lies for Prevention ; for that the Cause is not finished in the King's Court ; but if they would not controvert, nor re-examine the Acts of the King's Court, but build their Sentences upon them, they were not to be prohibited ; as if they deprived a Man by Sentence, because he was convicted or attaint of Felony, Murder, or Manlaughter, at Common Law. *Hob.* 290, 291. See 2 *Inst.* 637.

5. If a Parson of a Church be convicted of Manlaughter, and hath his Clergy allowed, according to the Statute 18 *Eliz.* and is delivered out of Prison ; if he be after sued in the Ecclesiastical Court, in Order to Deprivation for this Offence, a Prohibition lieth for him ; because by the Allowance of his Clergy, by the Statute, he is purged and acquitted of the Felony, and of all Penalties and Damages incident to it, in the Nature of a Pardon. *Mich.* 27 *Eliz.* *Rot.* 2574. *Nichol's Case* accordant. *Rol. Ab. Prohibition*, S. C. 3 *Hob.* 288, &c. *Searle and Williams Case*, and 2 *Inst.* 673.

6. A Prohibition was prayed by *Richardson Serjeant* ; for that *Searle*, a Parson, having been convicted of Homicide, and allowed his Clergy, was now sued in the Spiritual Court by Libel, that whereas he was convicted of Homicide, &c. it should be Cause to deprive him of his Benefice. *Per*

*totam*

*totam Cur'*: No Prohibition ought to be granted, and *Mountague*, Chief Justice, said, that though the Statute 18 *Eliz. cap. 7.* ordains, that after Clergy, the Party shall be set at large, and shall not be put to his Purgation; yet that doth not disaffirm the Judgment; whereto *Crooke* and *Doderidge* accorded. As to the Objection, that the Libel in the Spiritual Court was not against him, as an Homicide, the Court held it, so much the better; for if it had been so, a Prohibition ought to have gone; but it is, *quod convictus fuit de Homicidio*, as it ought to be; for without Conviction there is no Cause of Deprivation; and if it were against him, as an Homicide, it should be contrary to the Verdict given; but here they proceed only to deprive him, by Reason of his Conviction, and so thereby do affirm the Verdict. And as to the Objection, that as the Statute 18 *Eliz.* hath disabled him that he shall not make his Purgation, he shall now not be taken to be, as if he had made his Purgation before the Statute, and before the Statute he could not have been deprived. It was answered, that antiently by the Conviction he was to undergo two Punishments, the one of Death, the other of Defamation, and that the first was discharged by the Allowance of the Clergy, *Pena potest dirimi, culpa perennis erit.* Afterwards in the Time of *Anselme*, Archbishop of Canterbury, it was ordained by a general Council, *quod Clerici non tradentur manibus judicis temporalis*, which Council, in the Time of *Thomas de Becket*, was by Usurpation received here in England, and so far



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prevailed, that if any such Person prayed his Clergy, and was delivered to the Ordinary, they then re-examined him by twelve Spiritual Persons; and if he were acquitted, he should not be deprived; but this Trial, by twelve Clerks, was only *de Credulitate*, so as the first Conviction remained and the Purgation did not disaffirm the Verdict; for he is delivered to the Ordinary, by the Judgment of the Common Law, and the Entry thereof is, *quod traditur Ordinario*, &c. and the Law was, that if he did not make his Purgation, he ought to remain perpetually in Prison, and have slender Diet, *viz.* every Day Bread and Water only; and if the Ordinary refused to accept of his Purgation, then he might have a Command to the Ordinary to do it: And note that the Writ is, *satis habetur suspectus*; so as the Stat. 18 Eliz. 27 makes no Purgation for the taking away what was before, and the Purgation before the Statute did not defeat, but affirm the Verdict; and it is a Rule not to grant a Prohibition, where the Proceedings in the Ecclesiastical Courts are not against the Laws of the Land, nor the Liberty of the Subject; and so the Prohibition was denied *per Cur. Cro. Jac.* 430, 431. *Hob.* 288. *S. C. Keil.* 7 H. 8. 181.

7. A Bishop may be deprived for Dilapidations. 2 H. 4. 3 Godb. 259. 3 Bulst. 158. 2 Bulst. 279. 1 Ro. Rep. 86. Mo. 917. *Watson* Bishop of *St. David's* Case. *Salk. Rep.*

8. An Archbishop hath Power over his Suffragans, and may deprive. *Watson*, Bishop of *St. David's* Case in *Salk.*

9. By

9. By the Common Law an Archbishop hath a Metropolitick Jurisdiction, and Archbishops are over Bishops, as Bishops are over the other Clergy. *Watson, Bishop of St. David's Case in Salk.*

10. The Archbishop must deprive a Bishop. *Watson Bishop St. David's. Salk. Rep.*

11. A Bishop offending in the Ordering of Priests or Deacons, contrary to several of the Canons ————— is to be deprived by his Provincial in such Manner as the said Canons direct. See the Canons 1603.

12. For Dilapidations may be deprived. 29 E. 3. 16. 2 H. 4. 3. 11 H. 6. 20 H. 6. 46. 9 E. 4. 34. 25 E. 1. 1 Co. 72. b. *Vide* Division, Dilapidations, how punished. *Vide etiam* may punish their own Members.

13. *Cawdrey's Case* 5 Co. 1 Part 6 was remarkable, he being deprived for Preaching against the Common Prayer.

14. *Prohibition.* A Layman forged Orders when any and obtained a Benefice, for which he was Minister is prosecuted in the Ecclesiastical Court, in complained of Order to Deprivation, he prayed a Prohibition, for the Forgery is triable at Law; but in any Ecclesiastical Court belonging to any Bishop of his Province for any Crime, rejected, for the Forgery is concerning an any Bishop of his Province for any Crime, Ecclesiastical Court

the Chancellor, Commissary, Official, or any other having Ecclesiastical Jurisdiction, to whom it shall appertain, shall expedite the Cause by Processes and other Proceedings against him, and upon Contumacy for not appearing, shall first suspend him and afterwards, his Contumacy continuing, shall excommunicate him; but if he appear and submit himself to the Course of Law, then the Matter being ready for Sentence and the Merits of his Offence exacting by Law, either Deprivation from his Living, or Deposition from the Ministry, no such Sentence shall be pronounced by any Person whatsoever, but the Bishop, assisted by his Chancellor; the Dean (if they conveniently may be had) and some of the Preben-

Prebendaries, Ecclesiastical Matter, and he is sued for it if the Court there in Order to Deprivation only. 1 Lev. be kept near 138. 1 Sid. 217. Same Case. the Cathedral

Church, or of the Archdeacon (if he may be had conveniently) and two others of, at the least, grave Ministers and Preachers to be called by the Bishop, when the Court is kept in other Places. Can. 122.

#### 4. *How to be tried.*

1. **I**F Issue be, whether a Parson be deprived or not, the Court must write to the Bishop, and if the Issue be, whether the Bishop be deprived or not, they must write to the Archbishop to certify. *Watson, Bishop of St. David. Salk. Rep.*

2. Court Christian may not examine Felony, or other Capital Crime, tho' for Purposes examinable there; as in Case of Deprivation. *Hob. 121.*

#### XXI. *Where a Clerk is ousted or disturbed.*

##### 1. *Ousted.*

1. **A**NNO 28 H. 6. in the Exchequer Chamber; where an Incumbent ousted by his Patron, upon a Suggestion, that he is created a Bishop, or hath resigned, or hath accepted another Living, the Patron presented another Clerk, who is admitted, he shall not have a Spoliation, but where another Person claims the Patronage, he may, for then the Right of Advowson seems in Debate. *Statb. Abr. Consultation ult. Vide the Remedies, Spoliation.*



2 Trin. 4 Jac. in Canc. The Case was, that *Smith* was deprived by the High Commissioners for not conforming to the Canons of the Church; the Reason given in the Deprivation was, *quod fuit refractorius*, &c. but mentions no Canon; upon which Deprivation the King presented *Bird* to the Church, who was instituted and inducted, and yet *Smith* would not yield Possession; but he himself being in Prison, his Wife and Servants kept the Possession of the Parsonage House; whereupon a *vi laicâ amovendâ* was awarded out of Chancery; whereupon the Sheriff came to the Parsonage House, and the others thereupon fled, so that he could not apprehend them, and *Bird* finding the House open, entered peaceably, after which *Smith* made Affidavit in the King's Bench, that he was ousted by the Sheriff with Force, and *Bird* put in Possession; and upon this Affidavit the Court of King's Bench awarded a Writ of Restitution, he having an Appeal pending *del* Deprivation. And *Bird* exhibited his Bill in Canc. from whence the Writ *de vi laica amovenda* was awarded, and there returned, praying that *Smith* might be enjoined from the Possession, till he had defeated the Deprivation; and upon Day given to both Parties, the Lord Chancellor called to his Assistance the Lord Ch. Just. *Popham*, *Coke*, Ch. Just. of the Common Pleas, and *Flemming* Chief Baron, and they all concurred in Opinion, that a Decree ought to be pronounced for *Bird's* Possession, till *Smith* had undone the Deprivation. Mo. fo. 781, 782, 783.

3. *Hil. 39 Eliz.* A Lease was made of the Rectory of *Chebington* in *Com. Bucks*, and a Parson was presented to it, who came into Chancery, and supposed he was held out by Force; whereupon he had a *vi laica removenda* returnable in *B. R.* Whereupon the Sheriff returned *non inveni vim laicam neque armatam Potentiam*; and now it was moved, that the Lessee in Truth was put out of Possession, notwithstanding the Return of the Sheriff, and therefore Restitution prayed, and upon Affidavit of it, a Writ of Restitution was awarded out of the King's Bench, and a Precedent shewn of it between *Arkinsal* and *Palmer* in *Com. Cambridge.* 35 *Eliz. rot. 66. inter Placita Coronæ* accordant *Mo. fo. 462.*

## 2. Disturbed.

1. IF two several Patrons present severally to the Ordinary, and thereupon one sues a *Quare impedit*, or Affise of Darreign Presentment against the other, and recovers, and his Clerk is admitted; whereupon the Clerk of the other sues the Clerk of him who recovered by Way of Appeal, or otherwise in the Court of the Archbishop; for that he was not admitted to the Presentment of his Patron, there the Patron who recovered shall have a Prohibition to the Archbishop, &c. or against the Clerk who sued for this Cause to surcease, &c. And so if the Patron be disturbed by the Presentment of another Stranger, and he who disturbed sue in Court Christian the Clerk of the true Patron; or

*econtra*

*contra* the Clerk of the true Patron sue in Court Christian the Clerk of the Disturber, the Party aggrieved shall have a Prohibition. *Fitzb. N. Br. 42 K.*

2. If the King collate to a Prebend, or recover such Collation and his Clerk is admitted, and after the Clerk is vexed, or sued in Court Christian, by means of Appeal, Commission, or other Cause, by which the Title of Collation might come in Question, the King shall have a Prohibition to the Judge, &c. commanding him not to proceed; and if the King recover his Collation, or Presentation to a Church, and after the Execution of the Judgment is disturbed by Appeal, or Citation, or other like Means, or if, after the Clerk inducted, he is disturbed in Court Christian, the King shall have a Writ directed to the Sheriff and other Officer to attach the Bodies of them, making such Impediments, and another to the Bishops, and their Officials, &c. and also he may have a Prohibition to the Parties that they pursue not, &c. neither suffer the same, to their Knowledge, and the King may have an Attachment *sur ceo* to the Sheriff, if the Party will pursue, &c. *Fitzb. N. Br. 43. L. M.*

**XXII. Chaplains.**

**1. The King's.**

**1. Their Residence.**

**I**F the King's Chaplains, &c. are compelled by the Ordinary to Residence, when they are attendant on his Majesty and his Service,  
a Pro-



a Prohibition lies. *Fitzh. N. Br. 44. G. Of Chaplains, vide ante Court of Faculties.*

2. *Other Chaplains, vide Court of Faculties antea.*

### XXIII. *The Duty of the Clergy.*

#### *The Introduction.*

**P**ERhaps it may be thought this Chapter of the Faith and Duty of the Clergy, is a Transition from my Purpose; but I conceive it to be otherwise; for if any Clerk of Holy Church broach any anti-christian or Heterodox Opinion, or is scandalously Immoral in his Life and Conversation, tho' it be undoubtedly the Duty of Ecclesiastical Governours to punish and reclaim such, to a sound Faith and regular Life; yet if they neglect this so necessary Duty, I hold, the Temporal Courts may compel them thereto, or punish their Neglect, and correct the Delinquent, according to his Demerit. And what these Gentlemen are bound to believe and do, as also what are the Matters and Things they are bound to refrain from, appears from their Ordination Obligations, or Engagements, as is elsewhere mentioned, as well as from the Articles, and Canons of the Church; and I may also add, that every Thing required by holy Scripture, to be believed, or done, or is thereby forbidden to be done, are by them in most serious and solemn Manner to be believed, done or avoided accordingly; and not only so, but there are several other Duties required and commanded them to do, by several of the Statute Laws, as well as several other Things thereby forbidden them.

them, as appears, amongst others, by the Stat. 1 H. 7. 21 H. 8. 32 H. 8. 1 Eliz. 9 & 10 W. 3. and several other Stat. for Subscription and Oaths by them to be taken, &c. therefore these Scriptural, Temporal, and Ecclesiastical Laws, and Constitutions, are the several Oracles from whence Churchmen are to receive Instruction and Information in their several Duties, and to these they owe Observance, namely, to Scripture, as the Law of God, to the Temporal Laws, for Conscience Sake, for the Peace of Society, and as they are farther obligated thereunto by Oaths taken to secure their Obedience thereunto, &c. and to the Last, as the Laws of holy Church strictly binding them; to which I think it necessary to observe that every Church Clerk, at his Entrance into every of his Orders, hath, in most solemn Manner, in the Presence of God, in his Temple, at his Altar, before his Prelate, or Prelates, Clergy assistant at these holy Offices, and before an Assembly of Christians congregated on such Occasion, promised and vowed thus to beleive and do, according to these Doctrines and Rules, and that in their common received and known Sense and true Meaning, without any Mental Reservation, strained Constructions, or Sense of his own put upon them. Now should any one make these Sacred Vows, in such solemn Manner, as the Church requires, and further subscribe, according to Rubrick, and Receive the holy Sacrament of the Lord's Supper, in Evidence of his Sincerity, when he is an Unbeliever in any of the Doctrines, or intends not to be ruled by any of the Directions there laid down for his Rule and Governance, I think at least, it can be no Breach of Christian Charity, to determine such

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an one, an Hypocrite to God, and a Darer of his Vengeance, an Enemy to that Religion he has avowed, and to the Souls of Men, as well as a Traitor to the Laws, both Temporal and Ecclesiastical, of the Realm. And tho' he were sincere at his Ordination; yet if after he take up Notions, contrary to, or govern himself by other Rules, or lives as without God or Religion in the World, I submit it, such an one is to be considered in the same Light, or as one not much better, unless he quit his Order and Profession, with all the Emoluments and Advantages appendant, in which Case, I leave him as not worth following; and therefore, to return to the rest, I apprehend the Question is not whether all and every these Things are strictly and to a Tittle true, (which, for my own Part, I will not presume to doubt) yet these are the Doctrines and Rules the Clerk has, in such solemn Manner, vowed, to God and Men, to believe and observe; and therefore these he has (over and above being bound to some of them, as a Christian) obliged himself to; and therefore from these he cannot regularly depart. These are the Terms on which he received and holds his Office and Benefits. Upon the whole these are the Doctrines he is to maintain against all Gainsayers, and propagate and inculcate to the People, these are the Rules, by which he is to govern himself and guide those committed to his Charge: But to say, that thus to believe and do are too difficult, will, I fear, be no Excuse when he comes to make his great Account; for these ought well to have been considered in Time. If he either inconsiderately ran into these Engagements, or even suffered himself precipitately to be hurried into them, or was

actuated



*fluated by worldly Profit only; and not by Divine Impulse; or disbelieved their binding Quality, I will not presume to say his Punishment, but without Divination I may venture to pronounce the beginning of his Sin as a Clerk was his starting or setting out with a Lye both to God and Man.*

## 1. *As to their Faith, &c.*

**V**IDE antea, the Introduction.

## 2. *To be regular and sober in their Lives and Conversations.*

1. *Donea Persona* includes, not only Ability,

1. In Learning. 2. In Doctrine; but

also 3. In Honesty. 4. In Conversation. I observe, at

5. In the ordering,  
or ordaining,

of Deacons, the Bishop upon the Archdeacon's, or his Deputy's, presenting the Candidates at the Altar, very solemnly, in Presence of the Clergy and Congregation, cautions the Presenter, That he take Heed, That the Persons, whom he presents, be apt and meet, *for their Learning, and Godly Life, to exercise their Ministry duly, to the Honour of God, and the Edifying of his Church*: Then I observe that the Bishop demands of, and charges the Congregation, that if any of them know any of the Parties to have any Impediment, or to have been guilty of any notable Crime, that they shew the same: Then I find that the Bishop, with the Clergy and Congregation present, in the first Collect, peculiar to the Occasion, devoutly prays to Almighty God, mercifully to behold the Candidates, and that he would replenish them so with the Truth of his Doctrine, and adorn them with Innocency of Life, that both by Word and Good Example, they may faithfully serve God in their Office, to the Glory of God, and the Edification of his Church: Then I observe, that the Epistle for this solemn Occasion, which is Part of the 3d Chapter of the 1 Tim. is an Exhortation, and Charge to the New Deacons, and indeed to all others adorned with this Sacred Character, that they be grave,  
not

not double- 5. In Diligence in his Function. And these  
 tongued, not to instruct the People in true Religion, good  
 given to much Con-  
 Wine, not

greedy of filthy Lucre, holding the Ministry of Faith in a pure Conscience, and that they be found blameless, and ruling their Children and their Houses well: And I further observe from the 12 Chapter of the Acts of the holy Apostles, which is a Portion of Scripture also appointed on this Occasion to be read, That the Men, whom the Apostles direct the Disciples to chuse for this Sacred Function, should be Men of honest Report, full of the Holy Ghost and of Wisdom. After this, the Bishop examines every one of the Candidates for this order, whether they have Confidence, that they are inwardly moved by the *Holy Ghost* to take on them this Office, and Ministration, to serve God, for the Promoting of his Glory, and the Edifying of his People, and he also demands of them, if they think themselves truly called, to all which they are to answer, they trust, or think so. After which, he demands of them, if they believe *all the Canonical Scriptures*, whereto they answer, they do; whereupon the Bishop takes their solemn Promise severally, in the Presence of the Clergy and People congregated, *diligently to read the Scriptures to the People where they should be appointed, and to do faithfully their Office, and, (amongst many other Matters) diligently to search for the sick, poor, and impotent People of the Parish, which they promise in most solemn Manner, by God's help, to do: And also, that they will apply their Diligence to frame and fashion their own and Families Lives, according to the Doctrine of Christ, and to make themselves, as much as in them lies, wholesome Examples of the Flock of Christ; and also, that they will reverently obey their Ordinary and other Chief Ministers of the Church, and them, to whom the Government over them is committed, following with a glad Mind and Will their godly Admonitions. All which they in such solemn Manner, as hath been mentioned, Promise, God being their Helper: Whereupon the Ordinary delivers to them their Sacred Commission; and then, conceive, in further Obligation, they receive the Holy Communion of the Lord's Supper (the strongest Obligation a Christian can take) after which is a Prayer to Almighty God, to make the new ordained Parties, Modest, Humble, and Constant in their Ministry, and to have a ready Will to observe all Spiritual Discipline. In the ordering of Priests, I observe, is the like Caution to the Presentor, and Charge to the People, and also the like Collect, That God would replenish them with the Truth of his Doctrine; and adorn them with Innocency of Life, for the Ends mentioned in the former Collect in the Ordering of Deacons. In the Exhortation, the Bishop admonishes them to be ordained Priests of their Great and Important Charge, and to use all their Diligence in it, and lays before them the Direful Consequence of Negligence therein, and also the Horrible Punishment that will ensue such Negligence. And then he proceeds*

Conversation, and to avoid Contention. ceeds to exhort them,  
6 Co. 49. that no Place

be left amongst them, either for Error in Religion, or for Viciousness of Life, and that they neither offend themselves, nor be Occasion that others do; but to be studious in Reading and Learning the Scriptures, and in framing the Manners both of themselves, and those who appertain unto them accordingly; and, to that End, to set aside all worldly Cares and Studies, and to draw all their Care and Study to the faithful Discharge of their Holy Office, and to make themselves and Families wholesome and godly Examples for others to follow, and to obey their Superiors: All which they solemnly promise. And then, after the *Veni, Creator Spiritus*, and several Prayers, the Bishop gives them the Sacred Trust, and concludes with the Prayers, which the Church, in her great Wisdom, and Piety, hath composed for this Holy Purpose. From hence it is easy to perceive what a Candidate for the Orders of Priests or Deacons ought to be, at his Entrance into Orders, and as no Doubt can reasonably be made, I hope none will, but these Gentlemen having made these Vows, and entered into these Engagements are strictly bound to a religious Observance of them for the rest of their Lives; and that if any are found grossly faulty, the Spiritual Governors of the Church will take such Means, as they ought, to reduce them to their Duty. What is the Duty of these Gentlemen, in Point of Faith, hath been briefly hinted at already, as also the Resort they are to have to learn the same; but I cannot omit reminding them, it is not the least of their Duty, to inform themselves, what the Temporal Law has to say to them, though I have some Apprehensions this has not had its proper Attention; but however that be, I think proper, in Justice to the Care, Wisdom, and Piety of the Church, to take Notice, that besides what has been mentioned, that no impious, prophane, or loose Livers, or others unworthy, might thrust or intrude themselves into the Ministry; the Church has still further provided, by the 34th Canon, that every Candidate for Holy Orders bring a *Testimonium* of his good Life and Conversation; and by the 39th Canon the like is required before Institution, (which shew what their intermediate Lives ought to be) and that he appear a Person worthy of the Ministry, and because Men may lose their Learning by Disuse, I think it not altogether unnecessary to put the Clerk in Mind, that though, at his Ordination, or at a former Institution, he has been found and passed as sufficient; yet the Temporal Courts have determined, that the Ordinary, on every Institution, may, nay, and for this Reason ought, to examine every to be instituted Clerk, whether he be, at the Time, able, or not, for Learning, as well as for a sound Faith, and good Morals, for Institution.



I hold myself  
bound to de-  
clare it my  
Opinion, at  
least, that as  
the Temporal

Laws have thus strengthen'd Spiritual Governors Authority over their own Members when they give just Cause of Suspicion, that this is an additional Obligation on them to take Care to the Discharge of this Office; for as now they stand protected by the Civil Authority from all Redress against their just Procedure in these Matters, they cannot so much as pretend the Excuse made for their Omissions before the Civil Interposition; and I confess, to me this seems, in Conscience, a Command to them to see to this *Duty*.

2. The Statute 1 *H. 7.* for the more sure Reformation of Priests, Clerks, and Religious Men culpable, or by their Demerit openly reported of incontinent Living, enacteth, that it be lawful for all Ordinaries to chastise Priests, Clerks, and Religious Men, within their several Jurisdictions, by the Law of the Church, of Advowtry, Fornication, Incest, or any other fleshly Incontinency; and the Statute 32 *H. 8.* makes all such Forfeitures as therein is mentioned; and the Statute 21 of the same King prohibits them farming, &c. for these laudable and pious Ends, namely for the more quiet and virtuous Increase and Maintenance of Divine Service, Preaching and Teaching the Word of God, godly and good Example, and the better Discharge of Churchmen's Duty, the Maintenance of Hospitality, the Relief of the Poor, the Increase of Devotion, and the good Opinion of the Laity towards Spiritual Persons, &c.

3. By the 75 and 76 Canon it is required, that no Ecclesiastick, at any Time, other than for their honest Necessities, resort to any Tavern or Ale-house, neither board or lodge in such, neither give themselves to any base or servile Labour, or to Drinking, or spending their Time idly by

Day or by Night, playing at Dice, Cards, or Tables, or any other unlawful Game, but at all Times convenient to hear or read somewhat of Holy Scripture, or occupy themselves in some other honest Study or Exercise, always doing the Things which shall appertain to Honesty, and endeavour to Profit the Church of God, having always in Mind, that they ought to excel all others in Purity of Life, and should be Examples to the People, to live well and christianly; and these Things are enjoined them under Pain of Ecclesiastical Censures, to be inflicted with Severity *according to the Quality of their Offences.*

### 3. *As to their Habit.*

#### 1. *In general.*

EVERY Minister, saying the publick Prayers, or ministring the Sacrament, or other Rites of the Church, shall wear a decent and comely Surplice, with Sleeves, &c. and furthermore such Ministers as are Graduates, shall wear upon their Surplices, at such Times, such Hoods, as by the Orders of the Universities, are agreeable to their Degrees; which no Minister shall wear (being no Graduate) *under Pain of Suspension*, notwithstanding it shall be lawful for such Ministers as are not Graduates, to wear upon their Surplices, instead of Hoods, some decent Tippet of Black, so it be not Silk.  
*Can. 58.*

By the former of these Canons, I observe, that Ministers are so to apparel themselves as

2. Decency in Apparel enjoined to Ministers; in short, *they are always, and in all Places, and on all Occasions so to apparel themselves, that they may be known for what they are.* See Can. 74.

becomes their Order and Degree, and particularly, that being Graduates, they are to wear the Hoods of their respective Degrees; which no Minister shall wear, being no Graduate, under Pain of Suspension; and by the latter of these Canons, Decency of Apparel is enjoined Parsons; and therefore sure as they are directed how to habit themselves, (at Home and on Journeys) by the Canons of the Church, they are, in a Word, always to be so apparelled as their Profession, at least, if not their Degree may be known; and they respected accordingly; but how are these Canons (though they are certainly binding to the Clergy) neglected, despised, and set at nought, by many of the Clergy themselves; whilst not only in our Streets here, but all the Kingdom over many of these Gentlemen appear, as they daily do, in such various, and uncertain Lay Dresses, as not to leave so much as Room to guess or suspect their being of Sacred Order; whilst, on the other Hand, though it be confessed, that no one Degree whatever is essentially necessary to the taking all or any the Orders of the Church; yet we may see every Day Clerks walking the Streets, &c. in Scarves, as Doctors, or Chaplains, or others qualified, who have no Manner of Title thereto; and others strutting in Masters of Arts Gowns, who never took even the first Degree, or so much as ever were matriculated in, or made Members of, an University; nay, perhaps, never so much as ever saw one, or never may, in all their Lives: The Graduate Clergy sometimes complain of Discouragements from the Laity to the Universities, but these hinted at are (amongst many more, and it is at least to be feared, some worse) amongst themselves, and as Clergymen, where it would not be improper to begin a Reformation; Canons they have vowed to obey, and Canons thus require, if they have made an indifferent Matter a Duty, it was their own Choice so to do, and was a deliberate Act done with their Eyes open, and in full Sense of what they were about.

## 2. In Cathedral and Collegiate Churches.

In Time of Divine Service and Prayers in all Cathedral and Collegiate Churches when there is no Communion, it shall be sufficient to wear Surplices, saving that all Deans



Deans, Masters and Heads of Collegiate Churches, Canons, and Prebendaries, being Graduates, shall daily at the Time both of Praying and Preaching, wear with their Surplices, such Hoods as are agreeable to their Degrees. *Can. 25.*

## 4. To keep their Orders.

1. **N**O Minister or Ministers shall, without Licences and Direction of the Bishop of the Diocese, first obtained and had under his Hand and Seal, appoint or keep any solemn Fasts, either publick, or in private Houses, other than such as by Law are, or by publick Authority, shall be appointed, nor shall be wittingly present at any of them, under Pain of *Suspension* for the first Fact, and of *Excommunication* for the second, and of *Deprivation* for the third; neither shall any Minister, not licensed, as is aforesaid, presume to appoint or hold any Meetings for Sermons, commonly termed by some Prophecies, or Exercises, in Market-Towns, or other Places, under the said Pains; nor, without such Licence, to attempt, on any Pretence whatsoever, either of Possession or Obsession, by Fasting and Prayer, to cast out any Devil or Devils, under Pain of the Imputation of Imposture or Cousinage, and Deposition from the Ministry. *Can. 72.*

2. No Priests or Ministers of the Word of God, nor any other Person, shall meet together in any private House, or elsewhere, to consult upon any Matter or Course to be

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taken by them, or upon their Motion, or Direction, by any other, which may any Way tend to the Impeaching or Depraving of the Doctrine of the Church of *England*, or the Book of Common Prayer, or of any Part of the Government and Discipline now established in the Church of *England*, under Pain of *Excommunication ipso facto*. Can. 73.

3. No Man being admitted a Deacon, or Minister, shall from thenceforth voluntarily relinquish the same, nor afterwards use himself in the Course of Life, as a Layman, upon Pain of *Excommunication*, and the Names of all such Men so forsaking their Calling, the Church-wardens of the Parish, where they dwell, shall present, to the Bishop of the Diocese, or to the Ordinary of the Place, having Episcopal Jurisdiction. Can. 76.

4. If a licensed Minister should refuse to conform to the Laws, Ordinances, and Rites Ecclesiastical established, he is to be admonished by the Bishop, or Ordinary of the Place, to submit himself to the due Use and Exercise of the same; and if he do not, on such Admonition, conform in a Month, his Licence is void. Can. 57.

## 5. Marriages.

1. *When, where, and with what Caution, to be celebrated.*

1. **M**atrimony is to be celebrated publicly in the Parish Church, or Chapel, where one of them dwelleth, and in  
no

no other Place, and that, between the Hours of Eight and Twelve in the Forenoon. *Can.* 92, 104.

2. No Minister, on Pain of *Suspension, per triennium ipso facto*, is to celebrate *Matrimony*, but *sub modo*, *Can.* 62. not even those of exempt Churches. *Can.* 63. And at Law, where a Clerk of an exempt Church had married against this Canon in his exempt Church, yet having another Living, which was presentable, a Prohibition was denied to restrain the Ecclesiastical Censure, quoad the presentable Living, though the Offence was committed at his Church exempted; and though the Minister or Curate of such an exempt Church is not to be censured in the Ecclesiastical Court; yet I think no Doubt can be made, but that such Offence is a good Cause for the Impropiator, or Donator, to visit and censure, as his Conscience shall direct; and I further think that such Lay Incumbent or Visitor may well make the Canon the Rule and Measure of his Censure, and yet he is not by Law bound by this, or any other Church Law; and therefore not obliged to judge, as the Canon does, whether he thinks it suitable to the Offence, or not.

3. For the Terms of Licences for Marriage, see *Can.* 92, 93, 104. And for who may, and who may not marry by the Canon Law, see *Can.* 99, 100. And for and concerning the Matter by whom these Licences are to be granted, see *Can.* 101.



6. *The Sacraments.*1. *Christening Children, &c.*

1. **I** *Must repeat, that every Minister, at his Ordination, promised to be diligent in his Office, &c. as hath been shewn; and therefore he is not to neglect this particular Office on Account of Fee, or other Consideration whatsoever, if he would stand clear of Offence against his Ordination Vow. But to hear what the Canons say, as to this necessary and charitable Duty.*

2. *No Minister shall refuse or delay to christen any Child, according to the Form of the Book of Common Prayer, that is brought to the Church to him, on Sundays, or Holidays, to be christened. Can. 68.*

3. *If any Minister being duly, without any Manner of Collusion, informed of the Weakness and Danger of Death of any Infant unbaptized, in his Parish, and thereupon desired to go, or come, to the Place, where the said Infant remaineth, to baptize the same, shall either wilfully refuse so to do, or of Purpose or of gross Negligence, shall so defer the Time, as when he might have conveniently resorted to the Place, and have baptized the said Infant, it dieth, through such his Default, unbaptized, the said Minister shall be suspended (prout the Canon) and before his Restitution shall acknowledge his Fault, and promise before his Ordinary, that he will not, wittingly, incur the like again, provided that where there is a Curate, or Substitute, this Constitution shall*

shall not extend to the Parson, or Vicar, himself, but to the Curate, or Substitute, present. *Can. 69. As to the Excuse, in this Canon, extended to the Parson, or Vicar, I apprehend it is to be understood of Non-residents only; for if resident, I submit it, in Reason, and Conscience, it is his Duty to do it himself, or see that his Substitute do.*

From these Canons, as well as from the Ordination Obligations, the Office of the

Clerk to christen Children, I conceive to be exceeding plain and clear, but had they not particularly obliged themselves at Ordination, to the Performance of this Duty, and had the Canons been also silent in the Matter; yet sure they had been bound in Conscience to it upon their own Notions of it. It must either be of Consequence, or not, and they tell us it is so essentially necessary, that the Salvation of the Souls that die without it there is no Promise for in Scripture: And Dr. Bennet, in particular, labours hard this Point; and if the Argument be with them, as we must suppose, they are persuaded, then it cannot be doubted, but they ought to perform this Office on Request, and without any Delay; for sure a Soul is neither to be lost nor hazarded for a *petit Loss* to the Priest of a Fee, perhaps founded in Tort, which if they have any Right to, by Custom or otherwise, they ought first to discharge the Office, to intitle themselves to the Reward for doing it, (in which Case they have good Remedy at Law, if they can establish the Right) but sure not till then; for it would be hard, if not unjust, and highly unbecoming a Pattern of Justice and Equity, &c. to force Money out of Mens Pockets for doing of nothing, as is the following Case.

4. A Custom to take for christening a Child, when, in Fact, he does not do it, is not good; like the Case in *Hob.* of a Burial Fee, demanded by the Parson where he died, when he was buried elsewhere. If you have a Right to christen, libel for it; but you ought not to have Money for christening, when you do not do it. *Salk. 332.*

2. *The Lord's Supper.*

1. *How often in the Year the Parson is to communicate himself, and to administer to others, and where.*

1. In every Parish Church and Chapel, where Sacraments are to be administred, within this Realm, the Holy Communion shall be administred by the Parson, Vicar, or Minister, so often, and at such Times, as every Commoner may communicate, at least, thrice in the Year (whereof the Feast of *Easter* to be one) according as appointed in the Book of Common Prayer. Every Minister, as often as he administreth the Communion, shall first receive that Sacrament himself, after having instituted, *consecrated*, the Bread and Wine. *Can. 21.*

2. Every Minister is required to give Warning to his Parishioners, publickly in the Church, at Morning Prayer the *Sunday* before every Time of his administring that Holy Sacrament, for their better Preparation of themselves. *Can. 22.*

3. In all Cathedral and Collegiate Churches, the Holy Communion shall be administred upon principal Feast-Days, sometimes by the Bishop, if he be present, and sometimes by the Dean, and sometimes by a Canon or Prebendary, the principal Minister using a decent Cope, and being assisted with the Gospeller and Epistler agreeably, according to the Advertisment published *anno 7 Eliz.* The said Communion to be administred at  
such



such Times, and with such Limitations, as is specified in the Book of Common Prayer, provided that no such Limitation, by any Construction, shall be allowed of, but that all Deans, Wardens, Masters or Heads, of Cathedrals, Collegiate Churches, Prebendaries, Canons, Vicars, Petit Canons, Singing-Men, and all other of the Foundation, shall receive the Communion four Times yearly, at the least. *Can. 24.*

4. Every Minister, being possessed of a Benefice with Cure, though he chiefly attend to Preaching, and hath a Curate under him, to execute the other Duties for him; and also other Stipendary Preacher who readeth any Lecture, or catechiseth or preacheth in any Church, or Chapel, shall administer the Sacrament of the Lord's Supper, in such Manner and Form, and with the Observation of all such Rites and Ceremonies as are prescribed by the Book of Common Prayer, in that Behalf, which if he do not accordingly perform, then shall he who is possessed of a Benefice be suspended, and he who is but a Reader, Preacher, or Catechiser, be removed from his Place by the Bishop of the Diocese, until he, or they, shall submit themselves to perform all the Duties in the said Canon, in such Manner and Form, as therein is prescribed. See *Can. 56.*

5. Ministers not to administer the Holy Communion in any private House, except in Times of Necessity, when any being either so impotent, as he cannot go to Church, or very dangerously sick, are desirous to be Partakers of the Holy Sacrament, upon Pain of Suspension for the first Offence, and Excom-

Excommunication for the second; provided that Houses are here reputed for private Houses, wherein are no Chapels dedicated, and allowed by the Ecclesiastical Laws of this Realm; and provided also, under the Pains before expressed, that no Chaplains do preach or administer the Communion in any other Places, but in the Chapels of the said Houses, and also that they do the same very seldom, upon *Sundays* and Holidays, so that both the Lords and Masters of the said Houses, and their Families, shall at other Times resort to their own Parish Churches, and there receive the Holy Communion, at least, once every Year. *Can. 71.*

2. *Who not to be admitted to the Sacrament, or not till when.*

Vide *Canons 26, 27, 28, 57.*

### 7. *To the Sick.*

1. **W**HEN any Person is dangerously sick in any Parish, the Minister or Curate is to visit him (if the Disease be not suspected to be infectious) to instruct and comfort them in their Distress, according to the Order of the Communion Book, if he be no Preacher, or if he be a Preacher, then as he shall think most needful and convenient. *Can. 67.*

2. When any is passing out of this Life, a Bell shall be tolled, and the Minister shall not then slack to do his Duty, and after the Party's Death, there shall be rung no more,

more, but one short Peal, and one other before the Burial, and one other after the Burial. See *Can. 67*.

It is true, the Canon seems to leave the Minister in

some Measure, at Discretion to judge, whether the Disease be infectious, and if it is to wave going; but I take the Liberty to put him in Mind, at Ordination he solemnly vowed and promised *diligently* to search out the Sick, &c. without any express Condition. And I cannot see how one can be supposed to be implied: I dare believe a Physician would scarce refuse to attend his Patient, because his Distemper was imagined infectious, and yet I have more than once heard a Clergyman say, and declare, in publick Conversation, that if he thought the Distemper in any Degree infectious, he held himself bound neither by the Laws of God, or Man, to visit such sick Person; but I am strongly persuaded, that every considerate, good, Christian, Clerk, having duly weighed the Matter, will agree with me, the Nature of the Distemper can be no Excuse for a Neglect of this important Duty; for admitting the Hazard apprehended to be just, which I conceive, can hardly be allowed, without Dishonour to Providence; yet the Clerk, even in such Case, ought to attend his Duty, at any Hazard, rather than a Soul should go out of the World into an eternal and unalterable State, in Want of the last and most important Offices; suppose a Soul, by this Neglect, to be eternally and irretrievably lost; alas! no Recompence or Attonement can be made for it, by the over cautious, timorous, and distrustful, Clerk; but on the contrary, he has certainly the Loss of that Soul to answer; but says the Clerk I am not to hazard my Life, no, not even to save Souls; but I conceive, for the Reasons aforesaid, he clearly is; and even should he live a short transitory *Life*, in the Discharge of so necessary and charitable a *Duty*, he cannot be supposed but to have an eternal, beneficial Account in it. But I can by no Means allow, there is, in this Case, any such Danger, or not to be taken into Consideration; for God's Care is over all his Works; by his Providence we are preserved from innumerable Dangers daily and hourly, he is with us wherever we go, and whatever we do, or suffer, not a Hair of our Head falls to the Ground, without him, by him it is we live, move, and have our Being; and no doubt can be made, that the Souls of Men are precious in his Eyes infinitely more than the Body, as they are of infinite greater Estimation and Value; and is it then possible for one, who is so strongly bound to make Religion and the Attributes of God, &c. his Study, to doubt either of the infinite Power or Mercy to protect and keep him or reward his Labour of Love. I confess sincerely from my Heart none, in my Thoughts, at least, would hesitate upon this Duty, who is what his Character requires he should be; and I think he who acts contrary has the greatest Reason to apprehend the supposed Danger, or a worse Evil is the best that can befall him for his Antichristian Scruple, &c.



8. *As to Burial of the Dead.*

1. **L** *Inwood* makes it Simony to take any Thing for burying the Dead, unless due by Custom, like the Case in *Hob.* where one dies in one Parish, and is buried in another, the Parson where he died, notwithstanding any pretended Custom, shall not have a Burial Fee. *Salk.* 332.

2. No Minister shall refuse or delay to bury any Corps that is brought to Church or the Church-yard, (convenient Notice being given to him thereof before,) in such Manner and Form, as is prescribed in the said Book of Common Prayer, and if he shall refuse to christen (*prout* in the Canon) or to bury the Dead, except the Party deceased were denounced Excommunicate *Majore excommunicatione*, for some grievous and notorious Crime (and no Man able to testify of his Repentance) he shall be suspended, by the Bishop of the Diocese, from his

If this be so,  
how shall  
those Mini-  
sters be excu-  
sed, who ei-

ther refuse Burial to the Dead, because the poor Relations cannot pay paupers Fee, or, what is worse, a scandalous *extra twelfthpenny* Exaction, for not bringing the Corpse to the Minute, the Minister has arrogantly, fixed for the Purpose: Or where the poor Relations cannot without neglecting their Business, and starving their Families attend the Times appointed by the Minister, (though he has nothing to do with the Appointment, further than to have reasonable Warning thereof being perhaps at the Hours of their highest Labour, for the Interment of their deceased Relation. It is plain, from Canon, as well as common Sense and all Religion, that the Conveniency of the Relations of the Deceased in such Case, altogether to be consulted; and so it is, that they are allowed by the Canon to appoint the Time, giving convenient Warning to the Minister, as aforesaid so affixed by them, for that Purpose: And would our Clergy consider themselves the Servants of *Christ* and his Church

his Ministry by the Space of three Months. they would  
*Can. 68.* act other-  
 wise in this

Particular ; on the Rich, where are Perquisites attendant on their Attendance, they will wait at any Time, or Place, or in any Manner, but the Poor must suit themselves to the Conveniency of these Men, though the Canon be expressly against them as aforesaid ; but then says the Clerk, there will be more Labour ; then he cannot cut his Work short, by burying four, five, six, seven, eight, nine, ten, more or less, with one Office or Service, as is too frequent, especially in and about this Town.

## 9. Bound to keep Registers.

IN every Parish Church and Chapel within this Realm, shall be kept a Register, of the Marriages, Christenings, and Burials, *prout the Canon 70.*

## 10. In Relation to Recusants and Excommunicates.

1. Ministers solemnly to denounce Recusants and Excommunicates, that others may be thereby both admonished to refrain their Company, and excited to procure out a Writ *De Excommunicato Capiendo*, thereby to bring and reduce them into due Order and Obedience. Likewise the Register of every Ecclesiastical Court shall yearly, between *Michaelmas* and *Christmas*, duly certify the Archbishop of the Province of all and singular the Premises aforesaid. *Can. 65.*

2. Every Minister being a Preacher, and having any Popish Recusant or Recusants, in his Parish, and thought fit by the Bishop of the Diocese, shall labour diligently with them,

them, from Time to Time, thereby to reclaim them from their Errors, and if he be no Preacher, or not such a Preacher, then he shall procure, if he can possibly, some that are Preachers, so qualified, to take Pains with them, for that Purpose; and if he can procure none, then he shall inform the Bishop of the Diocese thereof, who shall, not only appoint some Neighbour, Preacher, or Preachers, adjoining to take that Labour upon them; but himself also (as his important Affairs will permit) shall use his best

The Duty of the Clergy is hereby clearly seen in this

Endeavour by Instruction, Persuasion and all good

Particular, and how far this Duty is neglected is not my Province to determine; but if it be a necessary Office for every Parish Priest, &c. as most certainly it is, then assuredly it ought not to be omitted: And I conceive, there are others who, tho' not within the Letter, yet, as being within the Reason of this Constitution, challenge the Care of the Clergy, who are appointed to the Cure of Souls, in the several Parishes, Precincts, Districts, Chapelries and other Divisions, where any of these wretched Creatures are, I mean Atheists, and Deists, the first denying God himself, and the others denying, sporting at, and profanely jesting upon all revealed Religion making the Mysteries of Godliness the Matter whereon to whet and exercise their Blasphemous Wit; these I must needs think the very worst of Men in Christian Society; but however, I must needs believe, that Charity and the Love of Souls, should (however others may think) be Considerations with our Clergy to Labour the Recovery of such Men to the Confession of the Truth. Our Saviour tells us himself he came not to call the Righteous but Sinners to Repentance, and that the Sick are the People only who want the Physician, his Command to his Disciples was, go and Preach to all Nations; this is a Command of a most general and universal Extent; and therefore these People are not to be given up as Castaways, and left to ride on Post, in their own Way to eternal Destruction, but should, by the peaceable and mild Means of the Gospel, Kind Treatment, Sound Reason, and good Argument, be reclaimed to a true Sense of Religion. I am far from being for the Use of what some Men call wholesome Severities to compel Men to come in, but I think it strongly the Duty of the Ministers of Christ to use all possible fair Means for the Recovery of these to the Truth, and by such Means enlarging the Dominions of Christ. But should it be yielded that these Men, as Apostates, or what else, have forfeited all Title to



good Means he can devise, to reclaim both the Care of  
them, and all others within his Diocese for the Church;  
affected. *Can. 66.* yet, methinks,  
even that

granted, which I think no good Christian will or can allow, another Consideration of itself, must sufficiently evidence the Necessity of this Duty, namely, the Mischief that these Men do, and the Havock they make in the Church, by tainting the Principles, and corrupting the Morals of unwary Christians: Amongst them, it is to be feared, are not a few of the Learned, and of others who profess themselves such, thro' a Vanity of being thought more learned, and having searched further than their Neighbours, and this Vanity alone, as well as that Desire which is in our very Nature, to wish all of our Minds, must needs urge them on to broach and propagate their destructive Opinions, wherever they come; to the Loss and Scandal of Religion, the Hurt of Souls, and the Disturbance of the Peace and Quiet of Society.

*II. Bound to instruct the Ignorant,  
and teach them the Catechism,  
&c.*

**E**VERY Parson, Vicar, or Curate, upon Every *Sunday* and *Holyday*, before Evening Prayer, shall for Half an Hour or more, instruct the Youth and Ignorant Persons of his Parish, in the Ten Commandments, the Articles of the Belief and the Lord's Prayer, and shall diligently hear, instruct, and teach them, the Catechism set forth in the Book of Common Prayer, &c. and if any Minister neglect his Duty herein, let him be sharply reprov'd upon the first Complaint, and true Notice thereof given to the Bishop or Ordinary of the Place: If after submitting himself, he shall, willingly, offend therein again, let him be suspended; if so the third Time, there being little hope, that he will be therein reformed, then ex-  
com-

communicated, and so remain, until he will be reformed, &c. Can. 59. I further conceive him obliged diligently from House to House, to search out the ignorant, and to instruct them; and were this done, there would be less Room left for the Clerk, either to offend himself, or be a Means that others should; the Canon requires, not only that Children should be catechised, which is the common Case, a few Sundays in the Year; but that every Sunday and Holy Day, not only Children, but all others of their Charges who are ignorant be instructed, and that not only in the Catechism in which our Religion is briefly summed up, but that first, to follow the Course of the Canon, they be taught the Ten Commandments, then that they be instructed in the Articles of the Belief, which I understand from the general Tenor of the Words, not only to mean the Creed, commonly called the Apostles; but all the other Articles of Faith, which the Church teaches to be believed, and then to proceed to the Catechism, as the Sum total of all that's required to be believed or done, and this, as its to be every Sunday and Holyday, so its also to be, for at least Half an Hour, under the Penalty in the Canon.

12. *Confirmation.*

1. **B**ishops are to confirm once in three Years. *Can. 60.*
2. Ministers are to prepare Children for it. *Can. 61.*

13. *As to others preaching for them.*

**N**either the Minister, Church-Warden, nor any other Officers of the Church, shall suffer any Man to preach within their Churches or Chapels, but such as, by shewing their Licenses to preach, shall appear unto them to be sufficiently authorized thereunto, as aforesaid. *Can. 50.*

14. *How often bound to officiate themselves.*

1. **E**VERY Minister being possessed of a Benefice that hath Cure and Charge of Souls, tho' he chiefly attend to Preaching, and hath a Curate under him to execute the other Duties, which are to be performed for him in the Church, and likewise every other Stipendary Preacher that readeth any Lecture, or catechizeth, or Preacheth, in any Church or Chapel, shall, twice *at the least* every Year, read himself the Divine Service, upon two several *Sundays, publickly, and at the usual Times, both in the Forenoon and Afternoon, in the Church, which he so possesseth,*



or where he readeth, catechiseth or preacheth, as is aforesaid; and likewise shall as often in every Year Administer the Sacrament of Baptism, (if there be any to be baptized) and of the Lord's Supper in such Manner and Form, and with the Observance of all such Rites and Ceremonies as are prescribed by the Book of Common Prayer, in that Behalf; which if he do not accordingly perform, then shall he that is possessed of a Benefice (as before) be suspended, and he that is but a Reader, Preacher, or Catechiser, be removed from his Place, by the Bishop of the Diocese, until he or they, shall submit themselves to perform all the Duties, in such Manner and Sort, as before is prescribed. Can. 56.

2. Every Beneficed Man, allowed to be a Preacher, and residing on his Benefice, having no lawful Impediment, shall, in his own Cure, or in some other Church or Chapel, where he may conveniently, near adjoining, (where no Preacher is) Preach one Sermon every Sunday of the Year, wherein he shall soberly and sincerely divide the Word of Truth, to the Glory of God, and to the best Edification of the People. Can. 45.

How often  
these Gentle-  
men are re-  
quired to offi-

ciate themselves, appears from these Canons, and it is observable that they are to divide the Word of Truth to the Ends proposed in the Canon; but I conceive this last Canon amounts to a Prohibition to meddle in political Matters, or of Civil Government, whereof they are rarely the most competent Judges, so as either to stir up the People to Rebellion or Sedition, or to make them uneasy at, or under, the Civil Power; as hath been too often the Case with some restless, turbulent and rebellious Spirits of this Class.

**15. Pluralists.**

**1. Sometimes to reside.**

**N**O License or Dispensation for the Keeping more Benefices, with Cure than one, shall be granted to any but such, as in the said Canon are, for that Purpose, mentioned, wherein is provided that, such Pluralist, be, by a good and sufficient Caution, bound to make his Personal Residence in each his said Benefices, for some reasonable Time in every Year, &c. *Can. 41.*

**2. To have their Cures sufficiently supplied.**

Every beneficed Man, licensed by the Laws of this Realm, upon urgent Occasions of their Service not to reside upon their Benefices, shall cause his Cure to be supplied by a Curate that is a Sufficient and Licensed Preacher, if the Worth of the Benefice will bear it, but whosoever hath two Benefices, shall maintain a Preacher licensed, in the Benefice where he doth not reside, except he preach himself at both of them usually. *Can. 47.*

**16. Their Duty to their Ordinaries.**

**1. General.**

**T**HEIR Duty to Ordinaries, and all other Spiritual Governors and others set over the inferior and subordinate Clergy, is easy,

*and ought, as they regard their Ordination Vows and Promises, and as they tender Canonical Obedience, and the Duty they owe to all those who have the Government and Visitation of them; so be sought out by these Gentlemen and to be strictly observed by them.*

*2. To their Ordinaries at their first Visitation.*

Every Parson, Vicar, Curate, School-Master, or other Person licensed at the Bishop's first Visitation, or at the next, after his Admission, are required to shew his Letters of Orders, Institution, and Induction, and all other his Dispensations, Licenses, and Faculties, to be by the Bishop allowed, or (if just Cause) disallowed, and being by him approved, to be, as the Custom is, signed by the Register; and that the whole Fees accustomed to be paid, in the Visitation, in Respect of the Premises, be paid only in the whole Time of every Bishop after, but Half the accustomed Fees, in every other Visitation, during the said Bishop's Continuance.

*Can. 137.*

It's true  
School-Masters are expressly named

in this Canon, amongst others, to be Licensed at the first Visitation of the Bishop; but I cannot avoid taking Notice that School-Masters are, by no Means, bound by this or any other Canon, save the School-Masters of Cathedral Churches, who must certainly receive their Power from the Bishop to teach such School, as every other School-Master must, from the Founder, or Governors, or Trustees, appointed by the Founder, as hath been fully shewn already, but in ordinary Cases of School-Masters the Ordinary hath no more Authority than he hath in Cases of Physicians, Surgeons, Midwives, &c. where he has nothing to do at all.



## XXIV. Appropriations and Impropriations.

## 1. General.

1. **I**mpropriation is, when it is in the Hands of a Layman, as Appropriation is, when it is in the Hands of a Bishop, College, or others, religious, &c. *Blount's Law Dict. sub hoc Tit.* See also *Appropriation*, and 2 *Mod.* 258.

2. Appropriations are but perpetual *Commend's*. 1 *Rol. Rep.* 476. *Mo.* 905. *Dav.* 81. *b.* *Plow. Com.*

3. A *Commenda perpetua* is, during the Life of the commendatory *tantum*, but an Appropriation is a Perpetuity. *Dav.* 81. *b.*

4. Appropriations are not dissolved by the Statute, (for then they would revert to the first Owners or Patrons who gave them to the Priory, &c.) but they are given to the King by the Act. *Sir Will. Jones* 3.

5. Every Appropriation compriseth in it a Dispensation to the Parson imparsoned, to have and retain the Benefice in Perpetuity, wherein the King is always, by the Common Law, to be an Actor, not only as Supreme Patron, but as Supreme Ordinary; for the King sole, without the Pope, could make an Appropriation. *Dav.* 73. *Plow. Com.* 503.

6. Though every Parish Church is, *prima facie*, presumed to be presentative; yet there may be Prescription that such Church was appropriate. 11 *Co.* 10. *a.*

7. Appropriations were anciently made to Spiritual Bodies, and not to Bishops, &c. 11 Co. 11. b.

8. When a Living is appropriate, it comes in *Manum mortuam*, and the King for ever hath lost his Title of Lapse. Cro. Jac. 518.

9. Stat. 27 H. 8. gives the Possession of Appropriations, as they were in the Hands of the Abbots, &c. Sir Will. Jones 3.

10. The making one Parson makes him Possessor of the Parsonage; for a Spiritual Office draws with it a Right to have all the Possessions; and for that Reason, when one is an Appropriator, he lawfully may intermeddle with the Tithes, as the same are annexed to his Church, &c. Plow. Com. 500. a. b.

11. The Statute 16 R. 2. c. 6. ordaineth, that in every Licence, from thenceforth to be made in Chancery, of the Appropriation of any Parish Church, that, according to the Value thereof, a convenient Sum of Money be paid, and distributed yearly of the Fruits and Profits of the same, by those who have the same Church in proper Use and their Successors, to the poor Parishioners of the said Church, in Aid of their Living and Sustenance for ever; and also that the Vicar be well and sufficiently endowed.

12. In the Statute of Monasteries there is a Saving of Rights, &c. but the Founders, Donors, &c. are excepted out of this Saving; so they are bound by the Body of the Act. 11 Co. 13. a.

13. The Lands, &c. given to Abbots, &c. and their Convents, &c. were given in the original Grants, to them and their Successors, in

in pure and perpetual Alms, or in Frankalmoigne to hold of the Grantor, &c. in free Alms. *Litt. Chap. Frankalmoigne, sect. 133.* and Lord Coke in his *1 Inst. 94. a.* says, *Libera Eleemosyna* are Words appropriate to this Case, and distinguishes it from other Tenures, and his Lordship further says, tho' neither Fealty, nor any other Temporal Service is due, yet it is a Tenure; *that is, if I may be allowed to comment upon his Lordship's Text; though these Tenures carry not with them the usual Badges of Dependence on their Lords, yet they certainly hold of them; and his Lordship says 1 Inst. 98. a.* all Lands are holden of some Body, and again in *Litt. Ten. sect. 141.* none may hold in Frankalmoigne, but of the Grantor and of his Heirs. It is an Incident to the inheritable Blood of the Grantor, and can be neither forfeited nor transferred, no more than the Foundership of an House of Religion, &c. but the Lord may release it. *Co. Litt. 99. a. b.* Littleton says, those who hold in Frankalmoigne were bound of Right before God to make Orisons, &c. for the Souls of their Grantors, &c. and their Heirs dead, and for the good Life and Health of them alive, and the Reason why they shall not do Fealty is, because this Divine Service is better for the Donors, &c. *Litt. Ten. sect. 135.* And my Lord Coke says expressly, they are bound thereunto, and as his Lordship further says, tho' the Liturgy be altered, yet the Tenure remains as it was. In Consideration of the Prayers of those who held in Frankalmoigne, the Lord is bound to acquit them of all Services to the Lord Paramount. *Litt. sect. 142.*



Co. Lit. 99. b. Save what is in Respect of his Person and Resiency. Co. Lit. 100. a. *And therefore, though they are not to pray for the Souls of the Dead, yet, in my Apprehension, they are to go in their Duty as far as the Alteration will allow, that is, they are still to pray for the good Life, Prosperity, and Health of their Lords or Patrons; for this they may lawfully do; and therefore this Part of the original Duty is still obligatory upon them; and though I cannot think the Welfare of the Patron depends on the Prayers of his Clerk, yet I must think the Clerk bound to this Duty for the Reasons aforesaid, as well as for that the same was the Terms of his Tenure by the original Contract, whether he be Vicar indowed, or other Minister, Chaplain, or Clerk, deriving Benefit from these Eleemosynary Endowments. I have thought fit to observe thus much, and to refer the same to the Consideration of all Clerks therein concerned, as I have some Reason to fear that some of them, at least, have never dreamed of such a particular Duty.*

## 2. How made.

1. **A**ppropriations might have been by the Patron and Pope, before the Council of Lateran; because, till then, the Patron might give his Tithes to whom he pleased; but since that Council, it cannot be *sans* Consent of the Crown. 2 E. 3. 23. For now the King is interested in every Parish; for that it may devolve on him, and that as Patron. 21 E. 3. 6. Palm. 220. See

11 Co. *Priddle* and *Napper's* Case through-  
out.

2. Tho' an Appropriation be by Words  
*de presenti tempore*, and not *de futuro*, yet  
good. 11 Co. 11. a. b.

3. *How came to the Crown.*

1. **STAT. 27 H. 8.** gave all such Monaste-  
ries, whereof the Possessions did not  
exceed 200 *l.* a Year; so that whatsoever  
makes to that yearly Revenue, was meant  
to be given to the King. Also it was the  
clear Purpose of the Statute to give the  
King all that those Abbies had; and there-  
fore the Saving doth exclude the Founders,  
Patrons, Donors, &c. but if the Appropria-  
tion should be dissolved, the Giver should be  
restored to his Parsonage; and *Priddle's*  
Case, 11 Co. 13. is, that Appropriations in  
Reputation pass by the Statutes 27 & 31  
H. 8. *Hob. 308. Sir Will. Jo. 3.*

2. The Inferior Abbies being but of 200 *l.*  
a Year Value came to the Crown by the  
Statute 27 H. 8. *Cro. Ca. 423. Hob. 307.*  
*Sir Will. Jo. 2, 3.*

3. **Stat. 31 H. 8.** gives the Lands, &c. of  
Religious Houses to the King in as large and  
ample Manner, as the Abbots, &c. held the  
same. *Hob. 309.*

4. They came to the Crown as they were  
in the Hands of the Abbots, &c. *Sir Will.*  
*Jo. 3. 11 Co. 13. Hob. 308. Cro. Ja. 252,*  
*600.*

5. Lord *Hobart* observeth, that all the Ap-  
propriation of Abbies which were surren-  
dered

dered between the 27 & 31 H. 8. were, *ipso facto*, dissolved with the Dissolution of the Corporation, and were presentable, and might have new Incumbents; but as soon as the Statute 31 H. 8. came, they were restored, and given to the King, and such new Incumbents ousted. *Hob. 308*

#### 4. How into Lay Hands.

1. **P**arishes, Patrons, Institutions, Advowsons, &c. were by the Law of Men, and not by Divine Law, or the Law of God; and therefore Dispensations might be by human Law; and so of Appropriations *al les Ley-Gents*. No Parishes were till 267 Years after *Christ*. *1 Rol. Rep. 453.*

2. Before the Time of H. 8. no Lay Person could have a Rectory Improprate. *Pop. 168.*

It is to be observed, that the Statute gave these Livings to the Crown, in as ample, full, and absolute Manner, as they were before in these respective Religious Bodies; and then the Statute gives them to the Patentees of the Crown, in as full, and large a Manner, as they were either in those Religious Houses before the Statute of Distribution, or in the Crown, in Virtue of them, save the Royal Visitation, which is, indeed, no more than what the Crown had over these Livings, even whilst in the Hands of these Religious Houses, and then they were exempt of all Episcopal Jurisdiction, and so they still remain, and that indeed with greater Reason, as they are not only meer Lay Fees, but also in the Hands of meer Lay Persons, who owe no Canonical Obedience, nor are bound by Church Laws.

3. But the Statute 27 H. 8. is, that all Patentees shall injoy, &c. in ample Manner, &c. as the King, &c. *1 Rol. Rep. 98.*



4. The Intent of the Acts of Dissolution of Religious Houses, and of Exemption from Tithes, &c. were intended to benefit the Crown, and to make the Subject more desirous of purchasing the Appropriations and Lands, exempt from Tithes, &c. 2 Co.

47. a. 48. a.

5. Tithes, or the Ecclesiastical Duties, which came to the Crown by the Statutes of 27 H. 8. 31 H. 8. 37 H. 8. and 1 E. 6. are, by those Statutes and 32 H. 8. and 1 & 2 Ph. & Mar. in the Hands of Laymen, Temporal Inheritances, and shall be accounted Assets, and Husbands shall be Tenants by the Curtesy, the Wife indowed, and shall have other Incidents belonging to temporal Inheritances, only this Ecclesiastical Quality they have, that the Owner or Possessor, may sue for the Subtraction of the same in the Ecclesiastical Court. Co. Litt. 159. a.

5. *They are grantable over or transferable.*

1. BY Statutes the King and Lay Persons, are made capable of Parsonages appropriate, and they well pass by Grant from one common Person to another. *Plow. Com.* 501.

2. Stat. 31 H. 8. c. 13. makes the King and Laity capable of taking and holding the Appropriations of dissolved Monasteries, &c. and tho' they were not originally grantable over, as Incumbents of Parsonages presentable cannot, at this Day, grant over such Incumbencies, but must resign, if they will be clear

clear of their Incumbencies, yet now Improvements, by Act of Parliament, may be passed away, or transferred from one to another; and so the Appropriations of the *Knights Templers*, were to the Priors of *St. John*, by Consent of the Pope, (*though that I think no Ways was available, as he was always an Usurper, and never had any Authority here, &c.*) King, and Parliament. *Plow. Com. Grendon's Case. Palm. 219, &c. Hob. 307, 308.*

### 6. How favoured.

#### 1. General.

1. **W**Hether an Appropriation be good or not, cannot now be called in Question, but shall be intended good. *Cro. Ja. 252.*

2. Appropriations or Improvements are not within the Statute of Pluralities, not being at all in the King's Books, nor being deemed, in Judgment of Law, as Benefices. *Vide Stat. 21 H. 8. c. 13.*

3. The Statute 31 H. 4. made all Appropriations Lay Fees, and they are neither presentative nor Spiritual Functions. *Sir Will. Jo. 3. Cro. Ja. 518. Fitz. 250. Keil. 48.*

4. A Benefice appropriate is not within the Statute of 21 H. 8. of Pluralities. *Hob. 157, 158.*

5. An Appropriation is not void by the Clerk's being made a Bishop; but tenable with any other Preferment.

6. Though

6. Though every Parish Church is supposed presentative, and that the Incumbent came in by Admission, Institution and Induction, yet the Plaintiff may prescribe, that the Prior, &c. immemorially have been Rectors of the said Church; for this amounts to its having been appropriate, &c. and the Commencement of a Matter before the Time of Memory cannot be known, whether it came by Union, Appropriation, or how, &c. 11 Co. 10. a.

2. *There can be no Usurpation of them.*

1. There cannot be an Usurpation upon a Parson imparsoned; but if a Stranger meddle with his Tithes, &c. he may have Trespass or Assise, but not a Writ of Right of Advowson; for that is only for him who is out of Possession. *The Com.* 500, 501.

3. *Presumptions for, or in Favour of, them.*

1. *Though defective.*

1. *Stat. 35 Eliz. c. —.* That all Manors, Lands, Tenements and Hereditaments, which at any Time thentofore were the Possessions of any Abby, Monastery, Priory, &c. which after the 4th of February, anno 27 H. 8. were granted, or conveyed, or mentioned so to be, in or by any Letters Patent whatsoever, made by the said late King H. 8. to any Person, &c. were and should be reputed, taken, and adjudged to have been lawfully and perfectly in the real and actual Possession of the said King, and of his Heirs and Successors



cessors, at such Time as the same were granted by the said King. In the Purview of this Statute, four Things are to be observed. 1. The favourable Penning of it, *mentioned to be granted*, though in Effect, nothing passeth by the Grant. 2. The Generality of the Words, 1. Concerning the Quality of the Letters Patent, *in, or by, any Letters Patent whatsoever*, be they under the Great Seal, the Exchequer Seal, the Court of Augmentation Seal, the Duchy Seal, &c. 2. Concerning the Estate, or Interest, to pass by such Letters Patent, which is quite at large, and restrained to none in certain; and therefore if the Letters Patent purport a Grant for Life, or Years, the Statute hath as great an Operation, as to the Purview of the Act, as if the Letters Patent had purported a Grant of an Estate-tail, or Fee-simple. 3. The Generality of the Purview; for it doth not only extend to make the Grant good, but to vest the Mannors, Lands, Tenements, and Hereditaments, of the late Abbots, &c. in the actual and real Possession of King H. 8. and not only so, but also to him, his Heirs and Successors; so that the Lands shall as well vest in the King, his Heirs and Successors, when he grants the Lands for Life, or Years, as where he grants in Fee-tail, or in Fee-simple; so the Purview extends to three other Cases. 1. Where any such Lands, Tenements, or Hereditaments, came to the Hands or Possession, of the said late King H. 8. 2. Or which were put in Charge to or for his Highness in his Court of Exchequer, or any other Court of his Majesty's Revenue.

3. Or

3. Or by any Auditor, or other Officer of the said late King. Then follows the Qualification, or Restraint, *notwithstanding*, 1<sup>st</sup>, any Defect, Want, or Insufficiency, of, or in, any Surrender, Grant, or Conveyance of the said Manors, Lands, Tenements, or Hereditaments, or any Part thereof, to the said late King H. 8. or any other Matter or Cause whatsoever, by which his Highness was, or might have been, intitled to the same; so that the Scope and Purpose of the Statute was to vest in King H. 8. all the Lands, Tenements, and Hereditaments, which the Abbots, &c. had, notwithstanding the Defects aforesaid.

11 Co. 11. b. 12. a. b. 13. a.

2. All Appropriations, howsoever defective, were given to the King, by the true Meaning of the Laws of Monasteries, which meant to give all, as well in Reputation, as in Truth. *Hob. 148.*

3. Though there was a Defect in the Appropriation, yet if the Rectory be in Reputation appropriate, and so hath been used, it is given to the King, by the Statutes 27 H. 8. or 31 H. 8. and therefore the 19 *Eliz.* in the Dean of St. Paul's Case, it was adjudged in B. R. that a Chantry, or College in Reputation, and not in Law, was given to King E. 6. by the Statute 1 of that King, by these Words, *All and all Manner of Chantries, Colleges, &c.* 11 Co. 13. a.

4. 27 June, 29 *El.* in *Canc.* The Case was between *The Lord St. John* and *The Dean and Chapter of Gloucester*, for the Parsonage impropriate of *Penmark* in the County of *Glamorgan*; because that the Patron, who had appropriate, was but Tenant in Tail; yet as it always had

had continued as a Church appropriate, it was resolved by Sir *Thomas Bromley*, Lord Chancellor, Sir *Gilbert Gerrard*, Master of the Rolls, *Chute* and *Wyndham* Justices, whom the Lord Chancellor in this Case associated to him, That this Rectory in Reputation was given to the King, by the Statute of Monasteries. 11 Co. 13. a. The same of the Church of *Humbalton*. 11 Co. 13. a.

5. The Parsonage of *Bulbenam* was appropriate to the Abbot of *Salby*, and no Vicar indowed, according to the Act 4 H. 4. and 15 R. 2. but there had been a Vicar in Reputation continually, and the Rectory, as appropriate, continued also, and it was resolved, that this Rectory was given to the King by the Statute of Monasteries. 11 Co. 13. a.

6. Though the Appropriation is defective, or that the Advowson did not pass by the Grant, yet it shall be intended, in Respect of the antient and continual Possession, that there was a lawful Grant of the King, *Omnia præsumuntur solemniter esse acta*, which might make the antient Impropriation good; for *Tempus est Edax rerum*, and Records, and Letters Patent, and other Writings, either consume, or are lost and imbezilled; and God forbid, that the antient Grants and Acts should be drawn in Question, though that cannot be shewn, which at first was necessary to the Perfection of the Thing; and if the Impropriation had been drawn in Question in the Life-time of any of the Parties to it, they might have shewn the Truth of the Matter; but after all Parties dead, and such



such a Succession of Ages, in all which the Churches were esteemed and allowed to be rightfully inappropriate, if any Objection should now prevail, the longer the Possession of the Owners were, the more difficult it must needs be for them to make out their Title, &c. 12 Co. 4, 5.

If the Law be thus, how ridiculous, as well as iniquitous, must

it needs be, for Ecclesiasticks to pretend, or usurp a Jurisdiction over these Things, which in their Beginning were exempt, and in the very Nature of them are *extra* their Jurisdiction and Authority, and with which they cannot, without manifest Injustice, and endangering a Premunire, meddle.

7. And if a Confirmation was necessary, it shall be intended that there was one, *Ex diuturnitate temporis omnia presumuntur solemniter esse acta.* Hard. 382.

8. The Case was thus the Abbot of S. held the Parsonage of L. to his own proper Use, which, as a Parsonage appropriate, came to King H. 8. by Dissolution of Monasteries anno 31 H. 8. who in the 37th Year of his Reign granted it in Fee-Farm, under which Grant the Plaintiff claims; the Defendant had got a Presentation from the Queen, and to destroy the Appropriation, shewed the original Grant or Instrument of it 22 E. 4. with a Condition in it, that a Vicarage should be compleatly indowed, and alledged, it never was done; and therefore the Appropriation was void; and indeed there was no Instrument nor Proof of any Indowment; but yet as it had all along been reputed and taken to be appropriate, and all along a Vicar had been presented, admitted, instituted and inducted, as a Vicar rightfully indowed and paid his First Fruits and Tenths; it was resolved *per tout le Cure*,

that it shall be presumed that the Vicarage, by Reason of the Continuance, was lawfully indowed, for *omnia præsumuntur solemniter esse acta*, and it would be a dangerous Precedent to examine the Original of Appropriations of Parsonages, and the Endowment of Vicarages; for the Origin, in Time, of them will be lost, and so decreed for the Plaintiff. 12 Co. 4.

9. *Hill. 4 Jac. in Canc. inter Bedel and Bear*; the Church of K. was appropriate, *anno 40 E. 3.* and the Defect was, that *Humphrey de Bobun*, Earl of Hereford, (who granted the Advowson of the Church to an Ecclesiastical Body, to whom the Appropriation was made) was but Tenant in Tail; resolved clearly, that it was given to King *H. 8.* by the Statute. 11 Co. 13. a.

10. Though every Parish Church is supposed presentative, and the Incumbent to come in by Admission, &c. yet one may prescribe that a Prior, &c. and his Successors, &c. Time whereof, &c. had been Rectors, &c. for that amounts to the same as to say, that it was appropriate, &c. and the Commencement of a Thing before Time of Memory cannot be known; as whether it came by Appropriation, Union, &c. and with this agrees 21 E. 4. 65. a. 11 Co. 10. a.

11. One had gotten a Presentation to the Parsonage of *Gosnal* in *Lincolnshire*, and brought a *Quare impedit*, and the Defendant pleaded an Appropriation; there was no Licence of Appropriation produced; but because it was antient the Court would intend it. 1 Mod. 117.

12. Old Appropriations shall be presumed to be well and lawfully made. *Trials per Pais* 301, 392.

13. In Things of such Antiquity, *Omnia presumuntur solemniter esse acta*. *Trials per Pais* 406. Vide *Palm.* 427.

14. The Plaintiff brought a *Quare impedit* for the Church of *P.* which Suit was stayed by Aid Prayer, and the Cause removed into Chancery; whereupon the Plaintiff moved for a *Procedendo*, and on Oyer before the Lord Chancellor *Bromley*, in Presence of Sir *Gilbert Gerrard*, Master of the Rolls, *Chute* and *Windham* Justices, and *Popham* Attorney, and *Egerton* Solicitor General, the Plaintiff shewed a Gift in Tail of the said Advowson made to his Ancestor 18 R. 2. and Verdict for his Ancestor 12 H. 8. and a Presentation, by his Grandfather, to the said Church of a Clerk, who was admitted, instituted and inducted, with Possession for certain Years, and divers other Matters, to make out his Title; notwithstanding, as the Defendant, and those from whom he claims, had had the Possession Time out of Mind of the Parsonage as impropriate, (saving Interruption for some small Time) and as it would be of dangerous Precedent to the Queen and other Owners of Improprations being able to maintain their Titles, in all Points, and Circumstances, perfectly; it was resolved, by this Court of Chancery, by Advice of the Justices and Counsel learned of the Queen, that no *Procedendo in loquela* should be granted. 12 Co. 3, 4, 5. *Bedle* and *Beard's Case*. *Ley's Rep.* 14. *Stafford's Case*.



15. Whether Appropriations be good, or not, cannot now be called in Question, but shall be intended good, and to have all Requisites. 2 Co. Archbishop Canterbury's Case. Cro. Ja. 252, 317, 292. *Concurrentibus hiis quæ in jure requirantur.*

### 7. Suits concerning.

#### 1. To be in the Temporal Courts.

1. **A**N Appropriation is not cognizable in Court Christian. *Palm. 220.*

2. If a Vicar sue the Parson impropriate of the same Parish, to shew Cause why a Terrar, concerning the Lands and Tithes, appertaining to the Vicar, should not be allowed, a Prohibition lies. *Rob. Abr. Prohibition, F. 40.*

3. Treble Damages are given for predial Tithes, as well to Lay Persons, as to Ecclesiasticks, by the Statute 2 E. 6. c. 13. but if the Proprietor will sue in the Ecclesiastical Court, he shall recover but double Value, by the express Words of the Statute, wherein it is to be observed, that the Act of Parliament doth give a Temporal Remedy, at the Common Law, to Parsons, and Vicars and other Ecclesiastical Persons, for an Ecclesiastical Duty, and to Laymen, Proprietors of Tithes, the like Remedy; but, as hath been said, they have Election either to sue for the treble Value, at Law, or for the double Value in the Ecclesiastical Court, or for Subtraction of Tithes there also. *Co. Litt. 159. 11 Co. Priddle and Napper's Case.*

And if they will wave the Penalty, they may sue also

in Equity, and compel the Defendant to discover even against himself, as daily Experience shews, these Sort of Bills being frequent.

4. If a Vicar sue a Parishioner for Tithes in the Spiritual Court, and the Parson appropriate appear there *pro interesse*, and pray a Prohibition, it shall be granted. *Hill. 14. Ca. B. R. Robert's Case*, Prohibition granted. *Ro. Abr. Prohibition, fo. 312. Ca. 5. Vide Case 7. & quere sur cep.*

5. If there be a Parsonage appropriate, which came to the Crown by the Dissolution of Monasteries, and after it is granted over to a common Person, and there is also a Vicarage indowed in the same Parish, and by Command of the Visitor of the Archbishop in his Visitation, the Church-wardens of the Parish make a Terrar of the Tithes within the Parish, and Glebe, which belongs to the Parson, and which to the Vicar, and prefer it in the Spiritual Court; whereupon the Vicar libels in the Spiritual Court against the Parson to have it confirmed, and Sentence for him, and the Parson prays a Prohibition, and shews, in his Suggestion, and agrees all the Terrar to belong to the Vicar, but only the particular Tithes, *scil.* Tithes of Carrots, Coals, and such like, being in Lands out of Gardens, and for Burials in the Chancel, and for these he prays a Prohibition, a Prohibition lies; for though it be between Parson and Vicar, and so the Right of Tithes comes in Question between them, yet (because it is not between the Parson or Vicar, and a Parishioner, where no Prohibition lies; for that the proper Suit against such is in the Ecclesiastical Court) the Prohibition lieth; because the Vicar might have had his Action at Law, against the Parson, if he took the Tithes

## Jura Ecclesiastica.

being set out by the Parishioner. *Trin. 11 Car. Sir Geo. Winter and Peirce, Vicar of St. Peter and St. James in Bristol. Mich. 11 Jac.* it was moved again, and the Court took a Difference between a Parson appropriate and a Parson presentable, that the Parson appropriate had it as a Lay Fee by the Statute; and therefore it ought to be tried between him and the Vicar at Law, &c. *Rol. Abr. Prohibition, 311, 312. Case 3.*

6. If a Man having a Parsonage inappropriate, make a Lease for Years, of Parcel of the Tithes by Deed, which Deed is denied in the Ecclesiastical Court, and Issue taken upon it, a Prohibition shall be granted. *Pas. 8 Jac. per Cur. Rol. Abr. Prohibition, (U) Ca. 5.*

*Trin. 8 Geo. 2. B. R. Charlton and Fanshaw.*

\* 7. In a Suit for Tithe-Potatoes in the Court of Arches, the Plaintiff libelled, as Impropiator, the Defendant, by his Plea, had denied his being Impropiator; whereupon *Wright Serj.* now Mr. Justice, moved for a Prohibition; urging that the Ecclesiastical Court could not try such a Matter of Right, and accordingly a Rule was made to shew Cause. And Mr. *Parker*, now Mr. Justice, coming to shew Cause, observed, this was a Suit for Tithes of a Nursery in a Garden, which the Ecclesiastical Court has undoubtedly a Jurisdiction of. To this, he said, the Defendant had pleaded, that the Plaintiff is not Impropiator, as is set forth in the Libel, and upon this Plea, the Defendant had obtained a Rule to shew Cause, why there should not be a Prohibition, without



out making any Affidavit, that the Plea was refused ; and he submitted it, that the Ecclesiastical Court were well intitled to proceed ; for which Purpose he cited the Case of *How and Tidmarsh*, anno 1. of the King that now is, there a Libel was in the Court of the Bishop of *Litchfield* and *Coventry*, for not repairing and beautifying the Church ; the Defendant pleaded, that he was no Inhabitant ; whereupon Mr. *Strange*, now Solicitor General, moved in that Case for a Prohibition, submitting it, that the Ecclesiastical Court could not try the Bounds of Parishes ; but the Prohibition was refused. Mr. *Parker* also cited 1 Ro. 12. The Court said, in as much as the very Title which the Plaintiff hath set forth is, as Impropiator, and the Defendant has denied the Title, a Prohibition ought to go, for Defect of Trial. Mr. *Abney*, now Mr. Baron, said also, that this Point was so determined in *Whceler's* Case, in the late Queen's Time ; and accordingly the Rule was made absolute.

It is to be noted, that in Case of Impropiations,

Remedy is given for Tithes in the Ecclesiastical Courts, in Recompence for the Remedy given there for Proxies, and Procurations, &c. which could not be recovered in those Courts, till the Statute provided that Remedy ; Impropiators owing no Obedience to the Ecclesiastical Courts, and these Impropiations being mere Lay Fees, and exempt from all Episcopal Jurisdiction ; whereat some Churchmen, and their Lawyers, and some Mercenaries and Tools of Ecclesiastical Power, have (tho' without the least Colour of either Law, or Reason) been much disgusted, in Evidence whereof they have in many of their Writings published obsolete, over-ruled, and strained Cases, to countenance their Inraochments on the Liberty of the Subject, and Prerogative Royal, and to subject these Exemptions to their Power, or, I should rather say, Usurpations ; but that there can be no Usurpation upon an Impropiator, who cannot be put out of Possession.

8. *Exempt from Episcopal Jurisdiction.*1. *General to.*

1. ONE sued a Writ of Contempt for the King and himself, against *W.* Commissary to the Bishop of *N.* for making several Summonses to the Abbot of *E.* who is exempt from all Ordinary Jurisdiction, by the Charter of the King's Progenitors, and after, the same Plaintiff, sued another Writ, against the Bishop of *N.* himself for the same Cause, and adjudged, that the Temporalities of the Bishop should be seised into the King's Hands, and that the Plaintiff should recover his Damages, &c. *Fitz. Abr. Excommunication, 9.*

2. There are many Peculiars in the Hands of Lay People, where neither the Archbishop, or Bishop, have any Thing to do; the Ordinary there hath no Power to visit, but that is not to be intended in the Case of a Prebendary of a Cathedral Church, that he shall be exempt from the Visitation of the Ordinary. 3 *Lew. 212.* Quære, For I conceive this Case hath been since over-ruled, and that the Case of a Prebendary is the same with that of any other Person; for Appropriations are not cognizable in Court Christian, as is *Palm. 220.* and this, I conceive, extends to all Cases in whose Hands soever the same be, for though he owes Obedience to his Ordinary, as being of his Chapter, or holding any presentable Preferment in his Diocese,  
such

such Obedience is in Matters Ecclesiastical; but this of an Appropriation being Temporal, he stands in such Case absolutely exempt from all Duty to the Diocesan, quoad that; for he holds as the Prior, &c. held before the Dissolution, and as the King, and his Donor, have held since. And there is no such Difference, as Gibson in his Codex groundlessly takes, when in the Hands of a Lay Person, and when of an Ecclesiastick, for in both Cases the Law is the same.

3. *Twisden*: Wherever there is a Cure of Souls the Church is visitable, either by the Bishop, if it belong to him, if to a Layman he must make Delegates, if to the King, my Lord Keeper does it. 1 Mod. 12. I presume the Judge, in this Case, is to be understood, as to the Layman's making Delegates, to mean, if he finds himself unequal to this Duty, then he is bound in Conscience to delegate Commissioners qualified for it; but not that he may not do it himself, though he be really able; for it is to be observed, if his Commissioners do otherwise than he is convinced in his Conscience they ought, he may still undertake and determine it himself, according to Conscience, and as he may so take it up, I conceive, no Reason can be shewn, why he cannot do it in the first Instance; for his Commissioners are but in Aid of him, and I conceive, in this Case his Power, though more absolute, may be compared to the Ordinary's Authority, who, tho' ordinarily he judges by his Chancellor, or other Official; yet he may sit himself and determine Matters within his limited Jurisdiction, if he pleases, and have, as is to be presumed, Abilities.

4. Rec-



4. Rectories appropriate being now incorporated into the Common Law, and converted into Lay Fees; they are therefore exempt from the Jurisdiction of the Ordinary. 1 Mod. 260, 261. 2 Mod. 257. S. C.

5. *Procuratio exhibenda est secundum qualitatem personæ Visitantis, & substantiam Visitatorum.* Dav. 4. a. as is the Canon Law; and so the same Law says, *Nulla est adversus Procuracionem præscriptio.* Dav. 6. b. And it was resolved *per le Cure*, that Proxies were not extinguished by the Dissolution of Religious Houses; but were well preserved and saved to Ordinaries, as is *Dav. 2. b.* and so it is that an Impropiator pays Synodals, and Procurations, as well as an Appropriation in the Hands of Ecclesiastical Persons. 2 Mod. 257. What we call Proxies, the Canonists call *procuratio*; for that on every Visitation the Persons visited procured necessary Provisions for the Visitors, which, at first, were very reasonable and moderate, and were made in Victuals, (*viz.*) in *Esculentis & Potulentis*, but that with great Measure and Temperance, *ne Jejunior' Doctrinam Rubentibus Buccis prædicent*, as is said in one of the Canons; but after, when the Pomp, State, Grandure, Delicacy, and other Excess, of these Visitors, both in Retinue and Table, became so great and extravagant as to become not only grievous, but intollerable to the Church and Religious Houses, then every Church and House was reasonably taxed, and then *it was*, that Proxies were reduced to reasonable and certain Sums of Money, payable annually, in Nature of a Pension, to the Ordinary, who had the Visitation Power there

there *de mero jure*, as it is called, 10 *Eliz.* Dy. 273. and this Sum certain, payable in lieu of these Procurations of Victuals and Drinks shall be paid yearly, though his Visitations are not annual, and so the Rule, *Cessante causa cessat effectus*, doth not hold here, and so is Sir *W. Capel's* Case put in *Lutterel's* Case in 4 Co. Though Parsonages now are made Lay Fee, and are come into the Hands of the Lay-Gents, who are not visitable; and though the Religious Houses are dissolved and gone, yet these certain Sums of Money, which, as hath been said, came in Lieu of Proxies, and, by antient Composition, are made Part of the Revenues of Ordinaries, still remain, and are not extinguished, no more than Annuities, Pensions, or Portions of Tithes, which remain payable to this very Day out of many Abbies, and Rectories impropriate; the original Cause wherefore granted, or wherefore paid, may not now be examined or brought in Question: And to this Day, the King himself pays and allows Proxies, out of all the impropriate Livings, which he hath in his Possession; and therefore in every Lease which he makes of any of his Rectories impropriate, he takes a Covenant from the Lessee, that he shall bear, satisfy, and pay, all Proxies, Synodals, Pensions. *Dav. 3. a. b.* The Ignorance and Weakness of Lay People, who wanted Instruction and Confirmation in Matters of Religion, was the original Cause of the Payment of Tithes; and the Parson of the Church does not claim Tithes in Respect of the Land; but in Respect of the Person of the Pari-

Parishioner (and Unity of Possession does not extinguish Tithes, *Vide* 39 H. 8. Dy. 43. 32 H. 8. Bro. *Dismes*, 17.) This Case of Tithes, is parallel to that of Proxies, and concurs with it in all Points; for as Instruction was the Cause of the Payment of Tithes, so Visitation, which always (was accompanied with Instruction, *Litt. cap. De Frankalmoine*,) was the Cause of Proxies; and as Tithes are now due and payable to Lay Persons who have purchased impropriate Rectories, though they give no Instruction, so Proxies are due and payable to Ordinaries out of Impropriations, and Religious Houses dissolved, though their Visitation be ceased. And as none may prescribe *De non decimando*, as is commonly said in our Books, so the Canon Law hath a Rule, *Quod nulla est adversus Procuracionem præscriptio. Inst. Juris Canonici, lib. 2. cap. De Censibus*; and therefore Proxies, which resembled Tithes, in other Points, may be well compared with them in this Point, namely, that they shall not be subject to Extinguishment by Unity of Possession. *Dav. 6. a. b.*

6. The Kings of England in every Age, long before H. 8. granted Dispensations in Ecclesiastical Causes, as the Law of England is, that every Spiritual Person is visitable by the Ordinary, yet William, the Conqueror, by Charter granted to the Abbot of Battel, that he should be exempted from Visitation, and Jurisdiction of the Ordinary, in these express Words, *Sitque dicta Ecclesia libera & quieta in perpetuum ab omni subjectione Episcoporum, & quarumlibet personarum Dominatione, sicut Ecclesia Christi Cantuariensis*; by which



which he dispensed with the Laws. *Vide* lib. *De vera differentia Regiæ potestatis & Ecclesiasticæ*. Edit. 1534, where all the Charter is recited at large. The like Charter, was granted to the Abbot of *Abingdon*, by King *Kennelphus*, &c. Dav. 72. b. 73. a.

7. Where the Case is, as in *Monasteries*, by the Grants both of Kings and Popes, that they be free by a general Exemption, from all Ordinary Jurisdiction, Appeals are to the King, by the Statute 25 H. 8. c. 21. Hob. 186, 187. Cro. Car. 97.

8. *Peculiars*, though in the Hands of Ecclesiasticks, as *Appropriations*, are not to be presumed to be within the Jurisdiction of the Ordinary, unless it appears: And if a Citation had been, in such Case, it had been out of his Diocese within the Statute 23 H. 8. Skin. 519. And if this be so, in the Case of an Ecclesiastick, the Case must be much stronger still, where it is in the Hands of a Lay Person; for there can be no Pretence, that he is subject to the Bishop, or any other Ordinary; but only to the Crown, as Supreme; for when the Lord High Chancellor, as Visitor, is to visit, correct, and order, as he, in his Wisdom thinks fit, such Impropiator is, quoad Visitation, as the Books have determined, as free as his Grace of Canterbury, who is subject to no Visitation, but a Royal one; save that his Grace, perhaps, as bound by Canon, may be subject to Sentences and Censures of Convocation, &c. which Laymen clearly are not.

9. By the Statute 25 H. 8. c. 21. it is provided always, that the Archbishop of Canterbury, or any other Person or Persons, shall have no Power, or Authority to visit, or vex  
any

any Monasteries, &c. or other Places of Religion, which be or were exempt before this Act; but the same shall be had by the King's Highness, his Heirs and Successors, by Commission under the Great Seal, to be directed to such Persons, as shall be appointed, &c.

10. If a Peculiar be free, by general Exemption, from all Ordinary Jurisdiction, which was commonly the Case of Monasteries, both by the Grants of Kings, and Popes, the Appeal is to the King, and so is the Statute 25 H. 8. c. 21. *Hob.* 186, 187.

11. The Ordinary by no Act, *whatsoever*, can disappropriate a Church; and therefore the Appropriator is always Parson. *Hob.* 152. 2 *Leon.* 80. *Cro. Ja.* 252. *F. N. B.* 35. 38 H. 6. 20. 11 H. 6. 18. *Rob. Abr.* 350, 351. 6 Co. 29. b.

## 2. Cannot be sequestred.

1. The Rectory being in the Hands of a Lay Person is become Lay Fee, and cannot be subject to Sequestration; if it should, as the Court observed, the next Step would be, that Bishops would increase Vicarages upon them, when in Lay Hands, as well as *when they were* in the Hands of Ecclesiastical Corporations, which would lessen the Possessions of such who have purchased, under the Acts of Dissolution. 2 *Mod.* 258. 2 *Vern.* 35.

2. The Bishop cannot sequester; for being made a Lay-Fee, the Appropriation is out of his Jurisdiction, and the Remedy now only against a Lay Person, for not repairing,

of Dilapidations, &c. 2 Vent. 35. 2 Mod. 254. 1 Mod. 258. *le mesme Case.*

3. A Lay Impropriation may not be sequestred, for the Repairs of the Chancel; though the Repairs of the Chancel was an Ecclesiastical Cause; yet both the Rectory and Impropriator are Lay, and not to be sequestred, as the Possessions in the Hands of Ecclesiastical Corporations may. 2 Mod. 257.

4. An impropriate Church may by the Statute 32 H. 8. be sequestred for Pensions, Proxies and Synodals. 1 Mod. 259.

And in Re-compence, by the same Statute, Remedy

is given in the Spiritual Court to Lay Impropriators, for Tithes due to them, before which there was no Remedy for either, but in the Temporal Courts. 1 Mod. 260. But as to all other Matters, as I take the Law to be, they remain as they were before this Statute, which only intended Remedies for Ordinaries in the Matter of Pensions, &c. and in lieu thereof gave Lay Impropriators Remedy for their Tithes, in the same Courts Ecclesiastical, but neither meant or intended further.

3. *Visitable only by the Patron.*

1. The Suggestion in a Prohibition was, that *Prince* was seised of the Rectory of *Sbrewsbury*, *ut de Feodo & Jure*, and that he being so seised, *de Jure* ought to present a Vicar to the said Place; but that the Bishop of the Diocese had, of his own Accord, appointed a Parson thereunto; this Exception was taken to it, (*viz.*) he doth not say, that he was Impropriator, but only that he was seised of the Rectory in Fee, so it not appearing that he was Impropriator, he ought not to present a Vicar. Justice *Dolben* replied, That in several Places in *Middlesex*,  
the



the Abbot of *Westminster* did send Monks to say Mass, and so the Vicarages were not endowed; but he put in, and displaced whom he pleased; that he often heard my Lord Chief Justice say, That the Abbot had as much Reason to displace such Men, as he had his Butler, or other Servant. *Cur.* Declare upon the Prohibition, and try the Cause. 3 *Mod.* 295. And as this Abbot in this Case, had this Power, so every other Head of a religious House, had the same Authority in the Case of Appropriation; and the same Authority and Power every Lay Impropiator hath at this Day, notwithstanding the Pretence of Gibson's Codex, Dr. Watson and others to the contrary: And the Pretence that some have made that some of these Impropiations not having Vicarages endowed, are void, or, at least, defective, as not being conformable to the Stat. of H. 4. and R. 2. I take upon me to say, from the Authority of the Books, and to insist, that such Pretence is as vain and idle as any of the Rest; for that at this Distance of Time, it is to be presumed, that what was done, was well and effectually done, omnia præsumuntur solemniter esse acta, and the Validity of any of these Matters may not now be drawn in Question, for Reasons too many and needless here to be particularized.

2. *Pemberton*, where one is made Patron, he hath the same Power as the Founder, and where the Patronage descends to the Heir, he hath the Power of a Founder, *eo Nomine*, as Patron; for the Patronage draws all Things with it. *Skip.* 464.

3. Lord Chief Justice *Holt*, An Ecclesiastical Corporation always hath a Visitor; and therefore you never heard of a *Mandamus* moved for an Abbot or Prior; every private Corporation hath a Visitor. 1 *Show. Rep.* 252.

4. There was a Vicar of a Living appropriate to a Priory before the Dissolution of Religious Houses, and such Vicar was *Ad mutum Prioris*, &c. *Cro. Jac.* 517, 518.

5. The King is supreme Patron. 1 *Ro.* 476. Though the Law of *England* be, that

every Spiritual Person is visitable by the Ordinary, yet it is to be noted, that Donations, Improvements, &c. and even Appropriations were, even in the Times of Popish Superstition, Idolatry and Tyranny here, and that though they were in the Hands of Ecclesiasticks, exempt and free from all Ecclesiastical Dominion, and so it was that *W.* the Conqueror, notwithstanding his Obligation to the Pope, &c. by his Charter, without either the Pope, or Aid of Parliament, but as supreme Head of the Church of *England*, exempted the Abbey of *Battel* from the Visitation, and all Jurisdiction of the Ordinary, as in *Davis* 72. b. 73. a. and though it should be admitted, That Ordinaries might visit these Religious Bodies, *quoad* their Rules and Orders, yet could they not, without Danger of a *Præmunire*, visit them as to their Appropriations, and the Case is still much stronger against these Church Incroachments, and sham, usurped, and false Jurisdictions, at this Day, as these Benefices are made Lay Fees, and incorporated into the Body of the Common Law, and again and again exempted from all Ecclesiastical Jurisdiction, under no less Penalty than the Forfeiture of Liberty and Fortune, as well real, as personal, as is clear from the Statutes of Provisions, and many adjudged Cases thereupon, and especially from the Statute of Queen *Mary*, who, though she actually went considerable Lengths towards Restoring the Church, or what was then so called, to her former Jurisdiction, or rather, Usurpations, yet she was prevailed with by the Advice of her Prelates and Clergy, for the Peace and Quiet of the Nation, to enact, That none should molest or disturb Improvements or Laymen in the Injoyment of these Benefices, under the Penalties aforesaid; and therefore if any, under our present happy Establishment in Church shall attempt the contrary, as I fear some Ecclesiastical Writers have, I cannot favour it with the Question, but pronounce such an one, in such Undertaking, to out-go the Papists themselves in Church Tort. I know Arguments have been attempted; (for none, or Force, can be really produced) for these Church Invasions from the Payment of Proxies, &c.

from the Defects in appropriating, &c. from the Ordinary's Swearing in, &c. Church-wardens, and licensing Ministers to these Livings, &c. yet these Objections are, I say, meer Appearances and Shadows; and to the first of them, it is a sufficient Answer, to say, That the Crown it self pays Proxies, for such of these Benefices as remain in their Hands; and yet that was never any Argument for Episcopal Jurisdiction over them, and I crave Leave to insist that there's no Difference to be taken in this particular, of Exemption from the Bishop's Authority, between the Crown and the meanest Subject in of an improprie Living. The true Reason wherefore these Livings pay these Matters, is, not as a Consideration for their Trouble, &c. in Visiting, as I have heard idly contended, or rather pretended, but as they were reserved to Ordinaries, and, I conceive, they were, at first, a Consideration for ordinary Consent to the Appropriation; for it is observable the Bishop was to consent thereto, and the King for his Royal Assent had a Fine; and these because they both, King and Ordinary, lost the Benefit of Lapse by the Appropriation, there being, by such Means, a perpetual Parson provided, and so no Lapse, in such Case could incur. As to Church-wardens, it has been expressly determined, that their Swearing them in, &c. in the Ecclesiastical Courts, is no Argument against perpetual Lay Incumbents of these Livings; and as to what the Canons direct in this Matter, they bind not the Laity, so require no Consideration; but what the Ordinary does, in this Point, he does meerly as a ministerial Officer appointed, I might say, commanded, to this Duty, by the Superior Temporal Laws, and not as an Ecclesiastical Judge, as some have fondly dream'd; as to Bishops Licences, in these Cases, I look upon them as nude and vain; for that these Ministers (as in every other Case where they come not in by Presentation, &c. are, *ad nutum* the Lay Rector; for Admission, Institution, and Induction, are nothing without Presentation, and Mr. Justice *Dolben* says, as hath been mentioned, the Abbot of *Westminster* placed and displaced such at his Pleasure; and if this be so, how idle must it be, to lay a Stress upon a Bishop's Licence to a Man to Day, who may be removed to morrow, without assigning any Cause for such Removal, as hath been often resolved? And here much more vain would it be, should a meer Diocesan, Suffragan, or other inferior Ordinary, presume to licence a Person to such a Benefice, where he must needs know he has no Jurisdiction, and also is absolutely certain, from the Clerk's Prior Retainer, he is then at the Time of this his further Licence in Possession of a Licence from another Bishop, and that when it shall be considered that every Bishop's Licence is of Force, not only over the whole Kingdom, but thro' all these his Majesty's Dominions, but still more absurd it must needs be, to say no worse, if a meer Diocesan shall presume to licence a Man, and that, to his Knowledge too, in Possession of a Licence from that Provincial, to whom this Diocesan owes canonical Obedience, as well as civil Deference, and Regard. Another Matter I shall presume to submit to Consideration is, what Conclusion might be made upon



upon him, should at any Time an Ordinary be found, by Acts or undue Insinuations, either sole, or in Combination with others, entering into Contrivances, and prevailing with any poor, pusillanimous, dastardly, Clerk, in such Case, to submit to do the qualificatory Acts before him, only necessary in presentable Cases, (I do not say this that I apprehend it ever will, but that it never may be the Case) thus to act, I conceive would not only be a wicked Part, if done with Intent to prejudice or maim a Lay Rector's Right; but would also be weak and unbecoming the Sacred Character to attack a Right, which the Law hath so well fortified, especially, when it shall be considered, that such Act, or rather mean, and low Concession of an unthinking, or ungrateful, and designing Clerk, could be of no Avail to the tortious End proposed; as the same could neither bind, nor prejudice his Lay Rector; as it would be against common Sense and Honesty, as well as the Rules of known Law, that the Patron should be prejudiced by such confederate Act, clothed with such injurious and fraudulent Circumstances: It is certain the Bishop cannot disappropriate, and it is quite as certain the Clerk cannot, and it is as certain as either, or both the former, that both together cannot; nothing but the deliberate Act of the Party himself can prejudice his Right; indeed it must be allowed, these Acts being bare-faced, and done in Defiance of the Law, may draw near to some of the Statutes which have been mentioned; but I cannot, at present, see any other Consequences from them. As to the remaining Objection of these Livings, or some of them, being defective, or wanting something which was necessary, to the perfecting of them, or that there is a Want of Proof, &c. it is to be considered, that after such a Length of Time, *omnia præsumuntur*, &c. There are almost innumerable Instances of adjudged Cases to this Point; but though the Defects do not arise from Length of Time, or Want of Proof; but that the same are as plain and manifest, as can possibly be imagined; as that the Royal Assent was wanting, or a Condition annexed thereto, which was never performed; or that a Vicarage was not therout sufficiently indowed, or that the Founder had not Authority to grant, as being but Tenant in Tail, &c. yet as these Livings were given to the Crown by Statute, and so came down to the Patentees, none of these Matters may now be examined, &c. I have heard another Objection from a Dignitary of our Church, from whom I might justly have expected more Knowledge in these Matters, that it lies upon the Patron to prove the Exemption; which I conceive to be a very great Mistake, as that would be, to require what in many, if not most, Cases, would be impossible; as Proof may be wanting at such a Distance of Time, and yet the Matter compleat; and I take Liberty to affirm, that if it has never been presentative, nor the Clerk come in by Episcopal Means, it can never be subject to his Visitation; he never had the Charge or Cure of Souls, &c. and therefore never had any Thing to visit. But then suppose, as I have heard it put by the Dignitary aforesaid, who has Ecclesiastical Jurisdiction, if the Clerk of an Impropriation

be an Heretick, Schismatick, immoral, &c. who must visit? I answer he Lay Rector: But suppose he neglect? Why then the King, on Information in his Chancery, before the Lord High Chancellor, will either compel him to correct such Errors, or do it for him. I crave Room for a few Words more, which is to observe, that where any Officer or his Official has, or may clandestinely, and without the Privy of the Impropiator, or by other undue Means presumed to visit any of these, or attempted Methods for drawing them under their Jurisdiction, that no such, nor any other Act, or Acts of theirs, shall not, nor cannot, bring, what in its own Nature is exempt, within their Jurisdiction, supposing any of them iniquitous and weak enough to insist on the Justice, or Benefit, of such an Act; for that they are not to be benefited of their own Acts, especially when tortious; for that it was without the Patron's Assent; for that no Act of the Ordinary can disappropriate; for that a Man shall not be prejudiced by the Act of a third Person; for that such Patron cannot be ousted of Possession, being perpetual Incumbent; and for that all Ecclesiasticks, of what Denomination soever, are expressly forbid to interrupt the Possessions of such, under the Pains of the Statutes of Provisions. To conclude this Matter, and close this Digression, I take Liberty to declare, I conceive it next to impossible any Ordinary or Official should mistake or find any Difficulty in distinguishing the Cases where he may and ought, and where he neither may, nor ought, to visit, &c. if he will take this Rule with him, that where the Clerk comes in through him in his judicial Capacity, as by a rightful Admission, Institution, and Induction; or by such Collation, Installation, &c. he has a Right to visit; for that the Clerk received rightfully a Charge from him; but if he came in by Admission, &c. without Presentation, or by the Appointment or Nomination of a Layman, &c. there the Ordinary has no Jurisdiction; for the Clerk came not in by his Means, he received no Charge or Power from him; so there is no Cause wherefore the Bishop should visit him, &c. or the Clerk owe the Ordinary any Obedience; and though it should be admitted, which would be unjust to grant, that the Ordinary's Licence were necessary to such Clerk; yet as he could only in such Case, be considered as an Instrument in the Hands of the Law, to do this Act, and a mere ministerial Officer; he cannot visit but at the Hazard and Expence, which has been mentioned.

**XXV. Donatives.**

**1. How favoured.**

**1. General.**

**1. T**ILL King *John's* Time, all the Bishopricks in *England* were Donative.

2 *Ro. Abr.* 342.

2. Tho' it be by a Lay Hand, yet mere *Laicus* is not capable of it; for his Function is Spiritual. *Co. Lit.* 344. *a.*

3. A Church Parochial may be a Donative, and exempt from all ordinary Jurisdiction. *Co. Lit.* 344. *a.*

4. They pass by the Gift of the Lay Patron. 2 *Ro. Ab.* 356. 2 *Keb.* 556.

5. No Lapse of a Donative. *Co. Lit.* 344. *a.* *Palm.* 221. *Cro. Jac.* 63. *Telv.* 60, 61. *Mo.* 765. *Cro. Jac.* 518.

6. In Case of a Donative, the Promotion of the Incumbent doth not make a Cession. *Salk.* 541. *Ro. Abr.* 330, 341. 1 *Inst.* 144. *Show. Parl. Case* 184.

7. Resignation must be to the Patron, and not to the Ordinary, and can be to no other; though to the Patron and a Stranger is good; for as to the Stranger, it is considered as a void Act, but good as to the Patron, who lawfully may take it. *Telv.* 61. *Cro. Jac.* 63. *Mo.* 765. 1 *Bro. & Go.* 201. *Cro. Jac.* 163.

8. On special Verdict adjudged, That the Incumbent of a Benefice donative, should resign to his Patron, and that it being the



Patron's Foundation, is also of his Visitation, and Correction, and the Ordinary hath nothing to do with it. *Mo. pl. 1062. Vide 8 Aff. 29 and 32.*

9. Donatives are not within the Statute 21 H. 8. c. 13. of Pluralities; not being in the King's Books, nor deemed, in Judgment of Law, as Benefices. *Vide the Stat.*

10. The Patron of a Donative need not present to it, but may take the Profits himself. *Palm. 221. 6 H. 7. 14.*

2. *Exempt from Ordinary Visitation and Jurisdiction, and only visitable by the Patron, or Donator, or Visitor appointed by him.*

1. The Ordinary hath nothing to do with a Donative, which may pass by Gift, *sans* Institution, or Induction. *8 Aff. pl. 31. Da. 46. b.*

2. A Parson of a Donative is not subject to Censures, as other Rectors. *Show. Parl. Cases 184.*

3. An Incumbent of a Benefice donative may resign to his Patron, and being of the Foundation of the Patron, is also of his Visitation and Correction; and the Ordinary has nothing to do with it. *Mo. 765.*

4. All Donatives of the King, and not only so, but of private Persons also, are out of the Jurisdiction of the Ordinary, and not visitable by him. See 20 E. 3. *Fitz. Excom. 9. 16 E. 3. Fitz. Brief 660. 21 E. 3. 60. 6 H. 7. 14. 5 Co. Cawdry's Case, fo. 15. 12 Co. 42.*

5. The

5. The Deanery of *Fernes*, a Donative by the King, being void, Queen *Eliz.* anno 20 of her Reign, gave and granted this Deanery to *Turner*, who was afterwards deprived by the Bishop of *Fernes*; for that he, *Turner*, was mere *Lay home*, & nient capable of such a Dignity, this Deprivation was held void, being *coram non judice*, and not voidable, as was contended on the other Side. *Da. The Dean of Ferne's Case. See 12 Co. 42.*

6. If a Deanery is a Donative, *per* Letters Patents of the King, it is not visitable by the Bishop; and by Consequence, out of his Jurisdiction; and so any Sentence of his of Deprivation must needs be void; as being *coram non judice*, as Judgment *de Frank-fee* in Court of antient Demesne. 11 H. 4. 17. or Judgment given in the *Marshalsea*, for a Contract made out of the Verge, &c. 19 E. 4. 20 E. 4. 15. and Judgment given in the Common Pleas, upon Appeal of Murder brought there. 22 E. 4. 33. such Judgments are void; the Judges not having Jurisdiction in such Causes. *Dav. 46. b. 12 Co. 42.*

7. A Benefice donative by the Patron only is a Lay Thing, and the Bishop shall not visit it; and therefore he cannot deprive, and if he meddle with it, he is in Case of a *Præmunire*: And in such Case was *Barloe*, Bishop of *Bath*, *Tempore* E. 6. and was forced to get a Pardon, for having deprived the Dean of *Wells*, which was a Donative, by Letters Patents of the King. *Bro. Ab. Præmunire 21. 2 Inst. Dav. 44. a. 3 Inst. 122.*

8. A Bishop visiting and depriving a Dean, or other Clerk, of a Donative of the Queen, or other, commits a Contempt against the Queen, for which he is punishable. *Da.* 46, 47. *12 Co.* 42.

9. *Maddox* moved for a Prohibition against the Chancellor of *Peterborough*, because he libelled in the Spiritual Court against him, for Marrying without a Licence in *Bedlesdon* Church, suggesting the Church to be a Donative, and that the Donor ought to appoint, *ex Jure*, Commissioners to visit, and that the Ordinary had nothing to do with it; and to *Twisden* Just. the Suggestion seemed good, but having another Benefice which was Presentative, would not grant the Prohibition. *1 Mod.* 22. *1 Sid.* 437. *S. C.* *Vide Co. Lit.* 344. *Cro. Jac.* 63. *Telv.* 60. *Mo.* 765. *Bro. & Co.* 201.

10. If a Clerk preach Heresy, or otherwise offend, the Ordinary may not meddle with him, but the Patron may visit and correct, or deprive him. *13 E.* 4. *Bro. & Co.* 202. *Telv.* 61, 62. *Cro. Jac.* 63.

11. Deprivation by the Ordinary, in the Case of a Donative, is a Contempt, for which such Ordinary ought to be punished; yet it being a Nullity, it shall not hurt the Party no more than a Judgment at Common Law, being given *coram non Judice*, shall hurt the Parties, against whom it is given; and the Reason of the Case *Vere* and *Jefferies* in *Mo.* 228. seems to be a Rule to this Point; and so in the Principal Case the Deprivation is meerly void; for that the Bishop, as Ordinary, could, by no Means, have Jurisdiction, this being a  
Thing



Thing wholly out of, and exempt from his Jurisdiction, by the Law. *Da. 46. b. 47. a.*

12. The Parson of a Donative is not bound to take a Faculty for Preaching, and if the Bishop attempt to visit, the King's Bench will prohibit him. *1 Mod. 90.*

13. *Hale* said, in the Case of a Donative, whether there be all the Ornaments requisite for a Church, the Bishop shall not inquire, neither shall he punish for not repairing. *1 Mod. 90.*

14. If the Bishop visit a Donative he is guilty of a Contempt, and if he gives Sentence of Deprivation, he incurs a *Præmunire*. *Da. 44. a. Bro. Ab. Tit. Præmunire, 8 Aff. pl. 29.*

15. A Benefice donative by the Patron only, is a Lay Matter, and the Bishop may not visit it; and therefore may not deprive, and if he any wise meddle with it, he is in the Case of a *Præmunire*. *Bro. Abr. Tit. Præmunire 21.*

16. The Visitation of all the King's Donatives belong properly to the Lord Chancellor. *Fitz. Nat. Brev. 42. a. Dav. 46. b.* or he may make a special Commission. *6 H. 4. 14. Dy. 273.*

17. Where Peculiars are in Lay Hands, they are free from all ordinary Jurisdiction, the Archbishop, nor particular Bishop, cannot visit, and Institutions, &c. by either, would be meerly void. *3 Lev. 211.*

*Banco Regis, Mich. 1726. Castle and Richardson.*

18. The Plaintiff was chosen Chapel-warden to a Donative, and was prosecuted in the Ecclesiastical Court, for not taking his

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his Oath of Office; whereupon he moved for a Prohibition; for that the Chapel is a Donative, and exempt of all ordinary Jurisdiction; but the Court were pleased to rule it, that though a Chaplain, or Parson of such a Donative, is not subject to Depri-  
 vation, or Suspension of the Ordinary; but the Donor is only Visitor in such Case; yet as to other Officers, they are under the same Jurisdiction of the Ordinary as other Places; for the Parson or Chaplain the Donor only puts in, not the other Officers. The Judges also agreed that a Parish-Clerk might be donative.

XXVI. *Chapels.*1. *Whether Ecclesia, aut Capella.*

1. **U**PON the Question, whether it were *Ecclesia, aut Capella pertinens ad matricem Ecclesiam*, the Issue was, whether it had *Baptisterium & Sepulturam*; for if it had the Administration of Sacraments, and Sepulture, it was in Law judged a Church. 2 *Inst.* 363.

2. Presentation to a Chapel made it a Church. *Palm.* 221.

2. *Are not Benefices in Judgment of Law.*

1. **F**REE Chapels are not within the Statute of Pluralities, not being in the King's Books, nor deemed in Law as Benefices. *Vide Stat.* 21 H. 8. c. 13.

2. Churches

2. Churches and Chapels erected and endowed by private Founders, are not at all in the King's Books, nor deemed, in Judgment of Law, as Benefices. *Vide Stat. 21 H. 8. c. 13.*

## 3. By whom visitable.

1. **A**S the King might anciently have founded free Chapels, and exempted them from all ordinary Jurisdiction, so he may, by his Letters Patent, licence any common Person to found such a Chapel, and to ordain that it shall be donative, and not presentable, and that the Chaplain shall be deprived, &c. by the Founder, and not by the Ordinary, and this seems to be the Beginning or Original of Donatives in *England*, and antiently all Bishopricks in *England* were donative by the Crown. *Peter Gregory De Beneficiis*, saith expressly, in so many Words. *Si tamen Capellæ fundatæ per Laicos non fuerint a Diocesano approbatæ (ut Loquuntur) Spiritualisitæ non censentur Beneficia, nec ab Episcopo conferri possunt, sed sunt sub Dispositione Fundatoris; ideo fundatores & heredes eorum possunt tales Capellanas donare, sine Episcopo, cui voluerint; tanquam Profana Beneficia*: That is, if Chapels founded by Laymen were not approved by the Bishop, and *spiritualized*, they were not to be esteemed Benefices, nor could be conferred by the Bishop, or Ordinary, but remained at the Disposal of the Founders and their Heirs, and they may give them to whom they please,



please, without the Ordinary, as Things unhallowed, or, as the Churchmen term it, *tanquam profana* or unspiritualized; so that until these Profana Beneficia have received Episcopal Benediction, (let the Intention of the Founder be never so pious, or the Act never so beneficent and good with Respect to Religion, or Charity, &c.) they are not to be esteemed Beneficia, without an Addition (as *Additio probat minoritatem*) but are in their Sense, to be termed, and looked upon too, as *Profana Beneficia*; so that the Sanctity, must necessarily arise, in the Sense of some Men, not from the pious Intention of the Founder, there is no religious Weight in that, that all comes from the pious Father, who breaths Blessings; but where he hath not sanctified, the Care is left to the Lay Patron or Founder.

2. The King shall visit his Free Chapels, and Hospitals. 8 Aff. 29. Fitzh. Nat. Br. 42. A.

3. The King is Ordinary of a free Chapel; because it is without Cure *de Animis*; and when a Lapse is, the King is not compellable to present, but the Ordinary, in the *Interim*, hath the Cure, and he shall provide for it. 1 Ro. Rep. 464. *Tamen quere.*

4. If the King founds a Church, an Hospital, or Free Chapel donative, he may exempt the same, from ordinary Jurisdiction, and his Chancellor shall visit the same; nay, if the King found the same, without any special Words of Exemption, the Bishop shall not, but the King's Chancellor is to visit the same. Co. Lit. 344. a. For the Clerk comes

comes in, without any Institution or Induction (which are the Matters which give the Ordinary Jurisdiction). 11 H. 4. Rol. Abr. 356.

5. The King's or his Progenitors Free Chapels, no Ordinary shall visit, but the Lord Chancellor. *Fitz. Nat. Brev. 42. A.*

6. *Twisden, Fitzherbert* saith, if a Chaplain of the King's Free Chapel keep a Concubine, the Bishop shall not visit, but the King. 1 Mod. 90.

7. The Lord Chancellor is Visitor of all the King's Free Chapels; and 2 H. 5. doth make him so of all Colleges of the King's Foundation. 1 Mod. 84. *I take this Statute only to be in Affirmance of the Common Law; for that not only the King, but even every private Founder, at Law, is natural Visitor of his own Charities.*

8. If the Ordinary will visit the King's Free Chapel, the King may sue a Prohibition to restrain him; for no Ordinary, but the Lord High Chancellor, may visit such. *Fitz. N. B. 42. a.*

#### *4. Suits concerning them.*

##### *1. Where to be tried.*

**I**F a Man hath a private Chapel, where-  
at the Vicar of *A.* is bound by himself,  
or sufficient Chaplain, to celebrate Divine  
Service every *Sunday*, and Festival Day,  
throughout the Year, privately for the Ma-  
ster, and his Servants, and Family, within  
the

the Manor, &c. Action *sur le Case* lieth for the Master ; for though Divine Service be Spiritual ; yet forasmuch as by Prescription, it belongeth to a private Person, and is to be performed, for his Ease, at his Chapel, within his Manor, &c. it shall be intended to have first commenced by Grant ; and therefore, for Nonfeasance of such Spiritual Act, an Action *sur le Case* lieth, and Damages shall be recovered for them. 5 Co. 73. a. Vide 22 H. 6. fo. 46. *similar Case.*

2. *David Jones*, Vicar of N. was libelled against in the Spiritual Court ; for that by immemorial Custom, the Vicars of N. had, by themselves, or others, said and performed Divine Service in the Chapel of *Chawbury*, for which there was such a Recompence, and that he neglected ; the Defendant came for a Prohibition, and without traversing the Custom, suggested, that all Customs were triable at Common Law ; and Mr. *Harcourt* urged, that it was enough for a Prohibition, that a Custom appeared to charge the Vicar with a Duty, for which he was not liable at Common Law. *Et per Holt C. J.* A Parson may be bound to an Ecclesiastical Duty by Custom, and when he is to bound, the Spiritual Court may punish him, if he neglects that Duty. The Custom might have a reasonable Commencement by Composition in the Spiritual Court, and begin by an Ecclesiastical Act, and a bare Prescription only is not a sufficient Ground for a Prohibition, unless it concern a Layman ; whereas here it is an Ecclesiastical Right, an Ecclesiastical Person, and an Ecclesiastical



cal Duty, and the Prescription not denied, notwithstanding 2 *Inst.* 491. I, said Lord C. J. *Holt*, never could get a Prohibition to stay a Suit in the Spiritual Court against a Parson for a Pension by Prescription. *Salk.* 550. *Vide* 1 *Vent.* 3, 120, 265.

3. Where is a private Chapel only for one and his Servants and Family, within his Manor of *D.* a private Action *sur le Case sur le Prescription* shall be maintainable, by the Lord, &c. for in such Case he alone, and none of his Family, should have the Action; and though Divine Service be Spiritual, yet as it is by Prescription, and belongs to a private Person, and is to be celebrated for his Ease and Convenience, within his Manor, it shall be intended to have commenced at first by Grant; and therefore, for Nonfeasance of this Spiritual Duty, an Action upon the Case lieth, and Damages shall be recovered therefore; and with this accords the Case of the Prior of *Woobourne*, anno 22 *H.* 6. fo. 46. but when the Chapel is not private to him and his Family, but publick and common to all his Tenants (which may be many) of his Manor, no Action lieth; for in such Case, did an Action lie, then every Tenant, as well as the Lord, might have his Action upon the Case, and so infinite Actions be brought for one and the same Default. *Et boni judicis est lites dirimere, & expedit Reipublicæ, ut sit finis Litium, propter communem omnium utilitatem*; and yet they shall not be without Remedy in such Cases, for that they may sue for such Default in Court Christian, as is *Litt. lib.* 2.

Yet, as I conceive, in the latter of these Cases, name-ly, where the Chapel is a publick and common one for the Lord and his Tenants, Relief may be properly sought and had in Equity, without going into the Ecclesiastical Courts, both as the Courts of Equity have a concurrent Jurisdiction with the Courts Christian, and as also by the Rule, it is good Cause to give Equity Jurisdiction; for that thereby Multiplicity of Suits are prevented; and in the present Case probably the Court Christian may reject the Prescription, &c. and then there must be Resort to the Courts of *Westminster-Hall* for a Prohibition, or the Bishop's Sentence may be erroneous, and then the Party must march still at a great Expence further by Appeal to the Provincial, and even he possibly may pronounce a like erroneous Sentence; but be that as it will, even he is not the Dernier Resort; but then the Matter for Justice must be carried over to the King; all which tedious and expensive Courses and their Consequences are saved, by allowing the Equity Jurisdiction I contend for in such Cases, as in the Case of a Copyholder. *Cro. Jac.* 368. *1 Rol.* 108. and *Mo.* 842.

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# APPENDIX.

## Of the Remedies.

The Introduction. 498.

I. *To whom Writs to be directed.*

II. *The Writ De cautione admittend'.*

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### The Introduction.

**I** Conceive it not improper to conclude this Labour with some Mention of the several Writs spoken of in the Prosecution of it; and as the Prohibition, and Præmunire, the Consultation, and Attachment, and so much of the Learning thereupon, as I thought necessary to my proposed End, hath been dealt of before pretty fully, I apprehend, it would be needless to say any thing further of them; and therefore I shall proceed briefly to the other Process; and first,

I. *To whom Writs to be directed.*

**I**F one recover against a Bishop, he may pray a Writ to the same Bishop, or to his Vicar General, if he be out of the Realm, or to the Metropolitan. *F. N. B.* 38. Q.

II. *The Writ De cautione admittend'.*

**T**HE Writ *De cautione admittend'* ought not to issue, till an Affidavit be filed; that the Bishop refused to admit of Caution. *1 Vern. 119.*

III. *Affiza utrum, sive Juris utrum.*

1. **A**SSIZA *utrum, sive Juris utrum*, is the highest Writ that a Parson, or Vicar, can have, for Recovery of the Glebe, &c. in Right of his Church. *Co. Lit. 159.*

2. The Reason why these original Writs, *Affiza utrum*, or *Juris utrum*, are called by the special Names of Assize more than other original Writs is; because that by these Writs it is commanded to the Sheriff, *quod summoneat Twelve*, which is, as much as to say, to summon a Jury; and because by these Writs a Jury is to be summoned and returned, the Law calls them Assizes, *ab effectu.* *Co. Litt. 159. a. b.*

IV. *Writs of Right, of Advowson, Darreine Presentment, and of Quare impedit.*

1. *The Difference, and where to be brought, &c.*

1. **O**F Advowson of Churches there are but three original Writs. 1. A Writ of Right, and the other two are of Possession, 1. *Darreigne Presentment*. 2. *Quare impedit*. Stat. 13 E. 1 c. 5. Vide Keble's *Readings sur cest Statute in Gray's Inn Hall, anno 1638.*

2. A *Quare impedit* must be brought in the County where the Church is. *Fitz. Abr. Quare non admisit*, 1.

V. *The Ne admittas.*

1. *What.*

**A** *Ne admittas* is a Writ which lieth for the Plaintiff in a *Quare impedit*, or *Darreigne Presentment*, and it supposeth the Bishop will admit the Defendant's Clerk, pending the Suit; and therefore this Writ is directed to the Bishop, and it ought to be sued in six Months after Avoidance; for after the six Months elapsed, he may not have this Writ, but of the King, *Nullum tempus occurrit Regi*; therefore he is not tied up to the six Months. *Fitz. N. B. 37. F.* And the Defendant may sue this Writ as well



well as the Plaintiff; but this Writ doth not lie, unless a Plea be pending in the King's Court, by *Quare impedit*, or *Darreigne Presentment*. Fitz. N. B. 37. H.

2. *From whence issuable.*

IT may be granted out of the Chancery directed to the Bishop, That he do not admit, &c. before that the King be certified in Chancery, that a Plea of *Quare impedit*, or *Darreigne Presentment*, is pendant in the Common Pleas; and if, in Truth, there be no such Plea pending, then the Party grieved may require the Chief Justice, to certify the King in his Chancery, that no Plea is pending, that the Party may have a Writ for the Bishop to proceed. Fitz. N. B. 37. H.

3. *What to be done thereupon, and of the Quare non admisit.*

1. **W**HEN one sues a *Quare impedit* against another, and after, pending the Suit, he sues a *Ne admittas* to the Bishop, &c. and then they accord or agree in the Common Bank to present by Turns; in such Case, he may have a special Writ, out of Chancery, to the Bishop, to admit him, who ought by this Accord and Agreement, to present to the first Turn; but first the King is to send a *Certiorari*, to the Justices of the Common Bank, to certify him in his Chancery of this Accord, and upon such Certificate the King is to send his Writ to

the Bishop to admit such Clerk, as by the Accord ought to have the first Presentment and Turn; and the Form of the Writ is in the *Register*, and in *Fitz. N. B.* 39. E. F.

2. If one recover an Advowson, and hath a Writ to the Bishop to admit his Clerk, and he will not admit him; then the Party may sue an *Alias* and *Pluries*, or Attachment, &c. or a Writ out of the Chancery, or Common Pleas, at his Election, *de Quare non admisit*, as well in Term-time, as in Vacation; but it is better in Term to sue in the Common Pleas, and in his Writ he ought to rehearse the Recovery. *Fitz. N. B.* 47. C. *Vide Fitz. N. B.* fo. 48. Tit. *Qu. incumbavit*.

#### VI. *The Writ De clerico admit-tendo.*

**T**HIS is a Writ directed to the Bishop, for the admitting a Clerk to a Benefice, upon a *Ne admittas*, tried for the Party who procured the Writ. *Register*, fo. 31.

#### VII. *The Quare non admisit.*

##### 1. *Where it lieth, and to whom.*

1. **T**HIS Writ must be brought where the Refusal was. *Bro. Abr. Quare non admisit*, 3.

2. If one recover his Presentation against the Bishop, he may have a Writ to the same Bishop, or to the Metropolitan, to admit his Clerk.

Clerk ; so if a Man recover against another.  
*Fitz. N. B. 38. B. C.*

2. *What a good Plea in.*

IT is a good Plea in *Quare non admisit*, to  
 I say, That the Church is litigious. *Fitz.*  
*Abr. Quare non admisit, 10, 12.*

3. *Contempts in.*

1. *How punished.*

FOR all Contempts against any Court of  
 Record, by Command of the King, by  
 his Writ under his Great Seal, the Offender  
 shall be fined, and imprisoned ; as in *Quare*  
*non admisit*, *Quare incumbavit*, &c. Attach-  
 ment *sur Prohibition.* 8 Co. 60. a.

VIII. *Quare incumbavit.*

1. *Where it lieth.*

1. *SANS* Judgment a *Quare incumbavit*  
 does not lie. *Fitz. Abr. Quare incum-*  
*bravit, 1.*

2. A *Quare incumbavit* lieth not, unless  
 a *Non admittas* be directed to the Bishop,  
 pending the Writ. *Fitz. Abr. Quare incum-*  
*bravit, 3, 5.*

3. *Quare incumbavit* lieth, where the Bi-  
 shop incumbers *infra tempus semestris*, though  
 no Action be obtained before of the same  
 Church. *Fitz. Abr. Quare incumbavit, 6.*



4. It was adjudged *per Cur'*, That one might have a *Quare incumbravit* without taking any Notice in his Writ or Count of any Recovery. *Fitz. Abr. Quare incumbravit, 7.*

5. If one recover against a Bishop, by *Quare impedit*, or Assize of *Darreigne Presentment*, if the Bishop's Clerk be in, he who recovered hath his Election to have a *Quare non admisit*, or *Quare incumbravit*, &c. *Fitz. Abr. Quare incumbravit, 7. Vide antea Quare non admisit.*

## 2. Where to be brought.

**A** *Quare incumbravit* is to be brought where the Church is. *Fitz. Abr. Quare non admisit, 1.*

## IX. The Writ De vi laica removend'.

1. **T**HIS Writ lieth where any Debate is between two Parsons, or Provifors for a Church, and one of them enters into the Church with great Power of Laymen, and holds the other out with Force and Arms, in which Case this Writ lieth for him so holden out, directed to the Sheriff, that he remove the Power which is within the Church: And the Sheriff shall be commanded, that if he find any Men there withstanding, that he take the Power of his County, if need be, and arrest the Bodies before the King at a certain Day, to answer the Contempt.

tempt. And this Writ is returnable, and shall not be granted before the Bishop of the Place where such Church is, hath certified in the Chancery such Resisting and Force. *Law Terms, sub hoc Tit.* It is said, that this Writ is granted, not only upon such Certificate of the Bishop into the Chancery, that there is such a Force in his Diocese, but also upon a Surmise made thereof by the Incumbent himself, without such Certificate of the Bishop; and there is a several Form for either Case. *Blount's Law Dict. and Cowel's Interp. sub hoc Tit. Vide Secular Clergy, Where ousted, The Remedy.*

2. The Writ, *De vi laica removenda*, lies, as well upon a Surmise made by the Incumbent, or he who is grieved, &c. without any Certificate made of it in Chancery by the Bishop, as upon a Certificate made of it in Chancery by the Bishop. *Fitz. Nat. Br. 54. D.*

3. For the Form of the Writ, see *Fitz. Nat. Br. 54. E. F. 55. A. B.*

4. If the King collate to a Prebend of any Bishop by Title devolved upon him, and the Bishop make Resistance; then the Writ shall be directed to the Sheriff, and shall be, *prout Fitz. Nat. Brev. 54. E. F.*

5. This Writ, *De vi laica removenda*, may be made returnable, or not returnable, at the Pleasure of him who sues it out, and may be returnable in the Common Pleas, as well as in the King's Bench. *Fitz. Nat. Brev. 54. G.*

6. By

6. By this Writ the Sheriff ought not to remove the Incumbent in Possession of the Church, whether such Possession be rightful, or not, but only to remove the Force, and to suffer the Incumbent to enjoy his Possession; and if the Sheriff either hath, or will, remove the Incumbent in Possession, the Incumbent, so in Possession, shall have a Writ directed to the Sheriff, commanding him, that he do not remove him, &c. if he hath done it, that, without Delay, he make Amends; and if he do it not, the Party may have an *Alias* and *Pluries*, and Attachment against such Sheriff. *Fitz. Nat. Brev. 44 H.*

#### X. *The Duplex querela.*

**V**IDE *Ecclesiastical Courts subordinate, In Cases where, &c. and The Matter Presentation.*

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*The End of Vol. II.*



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